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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1836

KENNETH LEO FOWLER AND FLORA D. FOWLER,

Petitioners

v.

GENERAL DEVELOPMENT CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Kenneth and Flora D. Fowler, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 29,1980.

OPINION BELOW

The opinion of the Court of Appeals, unreported, No.78-1692, appears in the Appendix hereto. No opinion was rendered by the District

Court for the District of Maryland, but the Memorandum and Order as well as the Judgment are also included in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 29,1980. A timely petition for rehearing was denied on February 21, 1980, and this Petition for Certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether transactions for (a) the purchase of undeveloped lots in another state, actual sites unseen, (b) the subsequent transfer of that same contractual interest to other similar lots and (3) the later offer of a house construction and purchase contract, which included a transfer of the same contractual interest in the lots toward the house, were security transactions involving investment contracts within the

definition of the Securities Exchange Act of 1934, 15 U.S.C. 78C (10) where:

1. The corporate seller retained possession and use of the lots for eight years and six months while the purchasers were making installment payments and, during which period of time, the purchasers had neither possession nor use, nor were they, pursuant to the contracts, entitled to such possession or use;

2. The Corporation undertook to develop an entire community with, and surrounding, those lots, including paved streets, graded roads, water and sewer lines, recreation facilities, shopping centers, schools, hospital, marina, yacht club, churches, golf course and swimming pool, and houses;

3. Most of the profit to be derived from later use or sale of such lots was, and is dependent upon the Corporation's development of the particular area wherein the purchasers' lots are located;

4. The purchasers' interest in specifically

located lots is convertible into an interest in other lots in the same community, an adjoining community, or a totally different community developed or to be developed by the Corporation.

5. The Corporation is dependent upon proceeds from the sales of these lots to retire liens and mortgages and to construct the improvements;

6. The Corporation commingles the monies received from the petitioners and other purchasers without putting into escrow funds intended for development of the particular area of their lots, but expends it upon development of all the Corporation's lots and all its communities in Florida;

7. the lots were offered as part of an investment program involving the future or later purchase of one of the Corporation's houses, exchanging the built-up equity in the lot for an interest in the house;

8. the prices (evaluations of lots and houses) are controlled by the Corporation and are not construed as being representative of

true market value;

9. in continuation of the investment program, the purchase of a house to be constructed by General Development Corporation was for the purpose of use as rental property, with the Corporation's subsidiary, Florida Home Finders, to manage said rentals from the date of closing on the house; and where,

10. purchase of a house in the Gardens of Gulf Cove automatically subjected the purchasers to liens and charges for maintenance and improvements of the Common Properties in the community, in accordance with the covenants and restrictions, and caused the purchasers to become members of a property owners' association with specified voting rights for each lot owned (one lot, one vote) with the Corporation's voting share as one lot, three votes).

11. Whether General Development Corporation, a Delaware Corporation with its principal place of business in Florida was doing business, interstate, intrastate or foreign, in the State of Maryland, in accordance with Section 7-202, of the Corporations

and Associations Article of the Annotated Code of Maryland, so that its failure to register should have prohibited its defense of limitations, pursuant to Section 5-204 of the Courts and Judicial Proceedings Article, where:

(1) sales of the Corporation's Florida land were, and are, contracted for in Maryland at dinner parties managed by the subsidiary of the Corporation but with the expenses paid by the Corporation;

(2) the procedure for such dinner parties was governed by the rules and instructions of the Corporation as to each detail;

(3) lot down payments, payable to the Corporation, were collected in Maryland by General Development representatives, and monthly installment payments are mailed to the Corporation to Florida from Maryland;

(4) the Corporation conducts sales activities in the State of Maryland through its subsidiary, which leases an office in Maryland, for the purpose

of doing business for the Corporation;

(5) the Corporation's consolidated financial statement includes the expenses of the subsidiary.

(6) company owned sources, including the Maryland subsidiary, produce more than 60% of the Corporation's sales;

(7) the Corporation regularly mails magazines (Vistas) and other lot and house information to lot purchasers in Maryland, and conducts seminars for the purpose of obtaining prospective house buyers;

(8) the Corporation arranges for transportation of lot purchasers from Maryland to the Corporation's communities in Florida, for the purpose of selling houses; it makes airline reservations, transports the lot purchasers to and from the airports in Maryland and Florida, provides lodgingsand meals, and returns them to their Maryland residencesafter the flight;

(9) such activities have been conducted continuously in the State of Maryland for a number

of years by the Corporation,

(10) the Corporation regularly enters into transactions with residents of Maryland; and

(11) the activities of the Corporation are a part of its regular, usual and ordinary business.

(12) so that the question of whether or not the Corporation was "doing business" in Maryland was a factual question to be determined by the Jury, precluding Summary Judgment or Dismissal by the Court.

III. Whether the trial Court's rulings on evidentiary matters:

1. Prejudiced the petitioner's right to a fair trial;

2. Confused and misled and prejudiced the jury, and;

3. Violated the petitioners' constitutional rights of due process and equal protection under the 5th and 14th Amendments of the United States Constitution; in that:

(a) evidence of the petitioners' other real

estate transactions and litigation, other than that agreed upon, was admitted where its probable effect was to confuse and mislead the jury;

(b) contrarywise, the petitioners were limited in their cross-examination and not allowed to freely question an adverse witness and agent of the Corporation, regarding other real estate transactions of the Corporation and was prohibited from inquiring into any of the Corporation's past or current litigation;

(c) records from the United States Department of Housing and Urban Development (HUD), Office of the Interstate Land Sales Disclosure, duly certified by that agency, relating to other of the Corporation's lot transactions were excluded by the Court although the Corporation's counsel had previously stipulated to their authenticity, if duly certified.

IV. Whether a new trial should have been

granted by the District Court in order to resolve any doubt as to the jury's confusion, or misunderstanding, or misapplication of the [illegible] in reaching a verdict which was consequently:

(1) Insufficient as a matter of law on the fraud count, and

(2) Contrary to the great weight of the evidence.

V. Whether the trial judge, upon Motion and Affidavit of the Petitioners, pursuant to 28 U.S.C. 144, in regard to personal bias and prejudice, should have disqualified himself from further proceedings and from the trial of this case.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 15.

§78b. Necessity for regulation

For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the counter markets are affected with a national public interest which makes it necessary to provide for regulation

and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions;

(1) Such transactions (a) are carried on in large volume by the public generally and in large part orginate outside the States in which the exchanges and over-the counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry,

and transportation in interstate commerce, and directly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the

value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.

§78c(10) Definition

The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing

agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, or in general, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

§ 78j (b) Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-

To use or employ, in connection with the

purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, 17 C.F.R. 240.10b-5, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, of the mails, or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with

the purchase of sale of any security.

28 U.S.C. § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such jude shall proceed no further therein but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. §1732 Record made in regular course of business;photographic copies

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or

record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business", as used in this section, includes business, profession, occupation, and calling of any kind.

§ 1733 Government records and papers; copies

(a) Books or records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction or occurrence as a memorandum of which the same were made or kept.

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof, June 25, 1948, c. 646, 62 Stat.946.

ANNOTATED CODE OF MARYLAND, COURTS AND JUDICIAL PROCEEDINGS ARTICLE,

§5-204. Denial of defense of limitations to foreign corporations.

A foreign corporation required by law to qualify or register to do business in the State or a person claiming under the corporation, may not benefit from any statute of limitations in an action at law or suit in equity:

(1) Arising out of a contract made or liability incurred by the corporation while doing buiness without having qualified or registered; or

(2) Instituted while the corporation is doing intrastate or interstate or foreign business in the State without having qualified or registered. (An. Code 1957, art. 23 § 93; 1973, 1st Sp. Sess., ch.2, §1.)

§5-205. Absence from State or moving from county.

(a) Denial of benefit of limitation.-A person who absents himself from the State or removes from county to county after contracting a debt, so that his creditor may be uncertain of finding the person or his property, may not have the benefit of any limitation contained in this title, but this subsection does not prohibit a person from removing himself or his family from one county to another for reasons of convenience nor does it deprive any person leaving the State for the time limited in this subsection of the benefits of any statute of limitations if he leaves sufficient and known effects for the payment of his just debts in the hands of some person who will assume the payment of them to his creditors.

(b) Person absent when action accrues.- A person who is absent from the State when a cause of action accrues against him may not benefit from a statute of limitation if the plaintiff files the action within the normal limitations period after the defendant returns to the State. (An. Code 1957,

art. 57 §§ 4, 5; 1973, 1st Sp. Sess., ch. 2, §1.)

CORPORATIONS & ASSOCIATIONS ARTICLE,

§ 7-202. Registration to do interstate and foreign business.

(a) Registration required.-Unless it is qualified to do business under §7-203 of this subtitle, before doing any interstate or foreign business in this State, a foreign corporation shall register with the Department.

(b) Manner of registration.-To register, the corporation shall certify to the Department:

(1) The address of the corporation; and

(2) The name and address of its resident agent in this State.

(c) Period for which registration effective.-Unless terminated by the corporation, the registration is effective as long as the corporation has a resident agent in this State. (An. Code 1957, art. 23, § 90; 1975, ch. 311, §2.)

22 Atty. Gen. O.P. 256 (1937)

A Corporation which regularly enters into transactions with the Maryland residents so as to

manifest its presence in the state is doing business in the State so as to be required to register or qualify.

22 Atty. Gen. O.P. 262 (1973).

Here, he concluded:

"As we construe the amended statute, the State requires every foreign corporation, doing interstate or foreign business in the State in such a manner and to such an extent that it is subject to suit in this State, to disclose how it can be reached by process in actions in which it is subject to suit in this State.

STATEMENT OF THE CASE

The petitioners, Kenneth and Flora Fowler, former residents of Maryland brought an action in the United States District Court, District of Maryland, against Respondent, General Development Corporation, a Delaware corporation with its principal place of business in Miami, Florida. They sued on the grounds of common law fraud and for violation of Section 78j(b), Title 15 U.S.C. and

Rule 10b-5,promulgated thereunder.

Jurisdiction of Count One in the United States District Court was founded on diversity and the jurisdictional amount, exceeding $10,000.

Jurisdiction in the United States District Court, was conferred by Section 27 of the Securities Exchange Act of 1934, at 15 U.S.C., Section 78 aa to Count Two, of the Complaint.

The Corporation was engaged in the selling of lots, construction and sale of houses, operation of water, sewer and gas systems,and community development.

The Fowlers transacted business in Maryland with the Corporation in 1969 by agreeing to purchase two undeveloped lots in Port Charlotte, Florida. In 1970, after discovering that their lot "interest" had been transferred to another Corporation Community, North Port Charlotte, by an alteration in the written contract, without their knowledge or consent, the Fowlers negotiated for transfer back or conversion of their lot interest to Port Charlotte in a different area, one already developed.

In 1973, the Fowlers again negotiated for the transfer of the lot interests into a house construction and purchase contract.

The Fowlers contracted for specific lots in Port Charlotte, Florida in 1969 including a written addendum in regard to the extension of public water and sewer lines to those lots at the time of completion of development.

The Fowlers had made installment payments for a year before they discovered that their payments were being applied to lots other than those they had purchased, in a community other than the one they had selected. Not until discovery, after the action had commenced, did they find out that the company had plans for a public water line but not for a sewer line to the original lots.

Rather than commence any action in 1970, the Fowlers accepted an offer of transfer to other lots in Port Charlotte with the same agreement that public water and sewer lines would be extended to the lots.

They inspected those lots before said transfer in 1970.

Not until 1973 did the Fowlers again visit Port Charlotte, then negotiated a contract for construction and purchase of a house for use as rental property, with the lot interest converted into the package transaction.

Then, and only then, did the Fowlers discover (1) there was no sewer line available, or even contemplated in the area of their transferred lots and (2) the house and lot prices quoted in Maryland, contracted for in Florida then later advertised in Maryland, for the same model houses, were all different, and that the terms given for financing were different in Maryland from those given in Florida. (A below, Vol.1, pgs. 1-14 Complaint). Negotiations broke down and were not concluded when the Corporation refused to sell at the advertised or previously quoted prices.

The lot contracts signed by the Fowlers in 1969 had the characteristics described in Question One presented to this Court. The Corporations' Answers to Fowlers' Interrogatories supplied some of the details. (A below. Vol.1, pgs. 20-43).

The trial Judge granted the Corporation's Motion for Summary Judgment as to Count Two, deciding that the described lot and house purchase transactions did not amount to securities and, that if they were securities, the action would be barred by the one year limitations period under Maryland's Blue Sky Law, despite the §5-204 denial of the limitations defense.

A jury trial was had on June 5th, 6th, 7th, 8th and 12th ,1978 on Count One, the Common Law Fraud action. Appendix C.

Judge Frank Kaufman presided ,in spite of the Fowlers' earlier Motion and Affidavit for Disqualification. Appendix F Appendix G.

The case went to the jury on special questions under F.R.C.P. Rule 49, with certain exhibits proffered by the Fowlers not allowed into evidence, and with certain questions propounded by the Fowlers to an adverse witness, an official of the Corporation, prohibited.

The Jury's verdict was in favor of the Corporation.

The Fowlers requested and were denied a new trial.

Telephone calls to Maryland from Florida, mail sent from Maryland to Florida and Florida to Maryland, and airline transportation for the Fowlers, arranged by the Corporation, to and from Florida, were instruments of interstate commerce used to effect some and/or attempt other transactions between the parties in connection with the purchase and transfer and conversion of the lots.

The civil action was filed on July 25, 1975. The Corporation pleaded the statute of limitations in defense of the securities claim. The limitations period for common law fraud in Maryland is 3 years from time of discovery. The Fowlers argued that the Corporation's failure to register (a fact that was undisputed) pursuant to Maryland Corporations and Associations Article, Section 7-202 of the State of Maryland Annotated Code, prohibited the raising of such defense, pursuant to the Courts and Judicial Proceedings Article Section 5-204.

The Corporation argued that its activities, undisputed as set forth in Question Two, presented herein, did not amountto "doing business" to an extent requiring registration in Maryland (a question vigorously disputed).

The trial court also denied the Fowlers' motion to set aside the verdict as being contrary to the evidence.

Thereupon, the Fowlers appealed to the 4th Circuit Court of Appeals. Upon affirmance on January 29, 1980, of the district court judgment, they petitioned for a rehearing. That petition was denied on February 21, 1980. Appendix D.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING QUESTIONS CONCERNING THE STATUS OF THE SALE, INTERSTATE, OF UNDEVELOPED LOTS, TO BE DEVELOPED INTO RESIDENTIAL COMMUNITIES, AS SECURITIES AND/OR INVESTMENT CONTRACTS, WITHIN THE DEFINITION OF §78c(10) OF 15 U.S.C.

A question of great public importance is involved in the case of Fowler v. General Development Corporation. A federal regulatory statute, the Securities Exchange Act of 1934, specifically §78j (b), is invoked as a protective measure, not for the Fowlers alone, although this is their cause of action, but also for the millions of inter-state lot purchasers who should be entitled to such protection, for the reasons set forth in,

§78b, Title 15 U.S.C.(pgs. 10-14 herein)

The District Court of Maryland's Memorandum and Order, filed June 14, 1978 (Appendix B), held that the contractual rights purchased by the Fowlers from General Development Corporation do not constitute a security within the meaning of 15 U.S.C. §78c(10).

In affirming on the basis of limitations, the Fourth Circuit Court of Appeals did not intimate any opinion as to whether the trial court decision was or was not correct in regard to whether or not the transactions described were sales of securities or offers of such sales.

This federal question relating to land sales and real property transactions is a recurring one which has not yet been settled by this Court:

Are interstate land sales, where the purchaser has no possession or use of the property for eight or ten years while the seller is developing a community, securities in the form of investment contracts?

Are the out-of-state lot purchasers, whose down payments provide working capital for the developer, along with hundreds/thousands of other similar small investors, into the common enterprise of community development, engaged in investment contracts?

When the expectation of profits by means of capital appreciation (from lot to lot and lot to house)are dependent upon the developers' efforts and management of its community building,with the use of theirs and others' funds, is it an "investment" of such funds?

And when it is the developer's decision as to which of its communities it will develop, some sooner, others later, and the developer's opinion and judgment where best to funnel the purchaser's funds(in monthly installments),are investment contracts by any other names nonetheless investment contracts, and as such securities?

The Corporation answered the Fowlers' Interrogatories regarding sales of their lots and the answer stated that 335,000 lots had been

sold. Over a hundred thousand home sites were still under installment contracts, according to the testimony of the Corporation's representative, Saul Sacks, at the trial.

In 1977, INFORM a non-profit, tax-exempt organization established in 1973 (which conducts research on the import of American Corporations on the environment, employees, and consumers) published PROMISED LANDS, a survey of the retail land-sales industry engaged in subdivision development throughout the United States. Summary Reports of Vols. 1 & 2, & 3 are available from that agency located at 25 Broad St. N.Y. City, 10004 (telephone Number 212/425-3550).

Those summary reports reveal that approximately 40 million acres of land have been cut up into lots for sale on multi-year installment contracts. Most of these lots (roughly 75%) have been concentrated in the sunbelt and vacation states of Florida, Texas, Arizona, New Mexico, Colorado and California, with marketing and sales activity aimed at the colder, urban states in the Northeast and upper Midwest. An estimated

20 million Americans have already purchased such lots. Summary Rpt., Vol. 3, pgs 1 & 2.

Among 19 land subdivision projects surveyed INFORM, 18 were selling lots at inflated prices, 15 had failed to secure enough water for their projected populations and 10 had mapped and sold lots in flood hazard areas.

These problems and others similar have given rise to litigation, some of which has been founded upon federal disclosure statutes. [15 U.S.C. 1701, 1701 (4,5), 1702 (a)(5), 1709, 1402, 1402 (4,5), Interstate Land Sales Full Disclosure Act)&regulatory statutes 15 U.S.C. §78j(b), Securities Exchange Act of 1934.

The outcome of such litigation has been mixed,confusing and conflicting. In some courts such lot sales are "securities" or "investment contracts." In others, they are not. McCown v. Heidler, 527 F. 2d.204 (10th Cir. 1975); Timmreck v. Munn, 433, F. Supp. 396 (1977, D.C. Ill.); Fogel v Sellamerica,Ltd., 445 F. Supp. 1269. (1978, D.C. N.Y.) Happy Investment Group

v. Lakeworld Properties, Inc.,396 F. Supp. 175 (N.D. Cal. 1975); Davis v. Rio Rancho Estates,Inc., 401 F.S. 1045 (1975, D.C., S.D. N.Y.); Husted v. Amrep Corp. 429 F.S. 298 (1977, D.C. N.Y.); Bongratz v.Belvidere,416 F.S. 27 (1976, D.C. Ill.)Fuls v. Shastina Properties, Inc., 448 F.S. 983 (1978, D.C., N.D. Calif.); Woodward v. Terracor 574 F. 2d 1023 (1978, 10th.); Bubula v. Grand Bahama Development Co. , 73 C3131 , unreported, N.D. Ill. June 27,1974; De Luz Ranchos Investment, Ltd. v. Coldwell Banker & Co., 608 F. 2d 1297 (Nov. 1979, 9th Cir.); Cameron v. Outdoor Resorts of America, Inc., 608 F.2d. 187 (1979, rehearing on Feb. 4, 1980, 5th.Cir.) [in Cameron, 611 F.2d. 105) condominium campsites were found to constitute securities). Somewhere between Howey ,328 U.S. 293 and Foreman, 421 U.S. 837,there is an uncharted area as undeveloped and inacessible as the lots initially offered and sold to a multitude of lot installment purchasers. The time is now ripe for a decision by this Court outlining clearly

when, where, and how purchasers of lots may be included within the Securities Exchange Act of 1934 definitions of securities and/or investment contracts The lower court decisions in this case present that opportunity.

There are compelling reasons for this Court to set some definitive guidelines and settle the controversies surrounding interstate purchasers of undeveloped lots and the federal securities laws. It appears that the lower courts are in urgent need of this Court's guidance.

The conflicts among the United States Courts of Appeals and among the United States District Courts, and the importance of the federal question presented justify the grant of certiorari to review the judgment below.

The lower court erred in granting Summary Judgment on the securities count because there was a genuine issue as to material facts:

(1) Did the described activities amount to investment contracts and therein securities?

(2) Was the Corporation "doing business" to an extent to require it to register, and by

failing to so do, to forfeit its limitations defense?

Timmreck v. Munn 433 F. Supp. 396; McCown v. Heidler, 527 F. 2d 204; Fogel v. Sellamerica, 445 F.S. 1269.

The Fowlers had demanded a jury trial on all issues and had at no time waived the right to such jury trial.

2. IN THE DECISION BELOW THE COURT OF APPEALS, 4TH CIRCUIT, HAS DECIDED AN IMPORTANT STATE QUESTION IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW.

Maryland Law requires (§7-202 of the Corporations Association and Article) that any foreign Corporation doing interstate or foreign business in Maryland shall register before doing any such interstate or foreign business in the State.

Maryland's Courts and Judicial Proceedings, Article, §5-204, states that:

A foreign Corporation required by law to qualify or register to do business in the state or a person claiming under the corporation may not benefit from any statute of limitations in an action at law or suit in equity:

Arising out of a contract made or liability incurred by the corporation while doing business without having qualified or registered.

Maryland law also requires that a foreign corporation qualify before doing intrastate business within the State. Corporations and Associations Article, § 7-203, formerly §90.

The trial Court,U.S. District of Maryland, decided, and the 4th Circuit Appeals Court affirmed, that the corporate defendant, General Development Corporation, was not doing business for the purposes of the statute, because the activities were solicitation of interstate sales.

The cases cited by the Court of Appeals were those in which the question concerned intrastate business and qualification requirements. Gem., . Inc. v. Plough Inc.,228 MD. 484 (1962); Premier Industrial Corp. v. Nec hamkin, 403 F. Supp. 180 (D. Md. 1975); Champion Spark Plug v. T.G. Stores Inc. 356 F. 2d. 462, 463,4th Cir. (1966).

The registration statute, which imposes upon

a foreign corporation only the responsibility of listing the name of a resident agent and information regarding its name, place where organized, date of organization and other pertinent data, imposes no onerous burden upon the foreign corpoation. But it does,if followed, give some protection to Maryland residents who do business with said corporation, and from which said business an action at law or/equity arises.

The Fowlers' arguments relied upon: Mason v. Union Mills/Paper Mfg. Co. 81 MD. 446, 32A. 311; Baden v. Washington Loan and Trust Co. 133 MD. 602, 105A. 860; La Porte Heinkamp Motor Co. v. Ford,24 F. 2d.861; International Harvester Co. v. Kentucky,234 U.S. 579, Meade Fibre Co. v. Varne, 3 F. 2d 520; Thomas v. Hudson Sales Corp.,204 Md. 458, 105 A. 2d 225; Kahn v. Maico,216 F. 2d 233 (4th Cir.); Becker v. General Motors Corp. 167 F. Supp. 164 (D.C. Md.); Shealy, Jr. v. Challenger Mfg.Co. 304 F. 2d 102; White v. Caterpillar Tractor Co., 235 Md. 368, 201 A. 2d 856; Call Carl, Inc.

v. B.P. Oil Corp. 391 F. Supp. 367 (D.C. Md., 1975); Eli Lilly & Co. v. Sav-on-Drugs, 366 U.S. 276.

Additionally:

> A foreign corporation which regularly enters into transactions with the Maryland residents so as to manifest its presence in the state is doing business in the State so as to be required to register or qualify. 22 Op. Atty. Gen. 256 (1937)

Were it not for Maryland's Long Arm Statute, providing for service upon the Maryland State Department of Assessments and Taxation, where a foreign corporation has failed to register and is not amenable to personal service within the State, for lack of a resident agent, the defendant corporation would have been unreachable for suit in the Fowler's state of residence.

Inasmuch as the issue concerning whether or not General Development Corporation was "doing business" was a factual dispute regarding a material fact, it should have gone to the jury. A factual dispute precludes, and should have precluded here, summary judgment or summary dismissal, by the trial court. Condon v. Richardson,

(C.A. Ill. 1969) 411 F.2d.489; United Indus. Corp. v. Nuclear Corp. of America, D.C. N.Y. 1967, 43 F.R.D.30; Rosen v. Bergman, D.C. N.Y. 1966, 40 F.R.D. 19.

Whether the Corporation was"doing business" in Maryland and whether the Corporation was entitled to the defense of limitations, where it had not registered to do interstate business, were questions, factual questions which were determined by the Court, not by the jury, as requested by the Fowlers.

The factual question regarding whether General Development Corporation's Maryland transactions were no more than solicitation or were actual binding contracts for the sale of lots was answered by the court instead of by the jury. The jury was not allowed to decide Count 2, the securities claim.

The Maryland statute is quite clear in its wording. A distinction is made between qualifying a foreign corporation to do intrastate business and registering a foreign corporation to do

interstate or foreign business. The corporate defendant was selling Florida lots on a continuous basis to Maryland residents by having them sign binding contracts in Maryland.

22 OP. Attorney General 256 (1937) states:

A corporation which regularly enters into transactions with the Maryland residents so as to manifest its presence in the state is doing business in the state so as to be required to register or qualify.

In Springle v. Cottrell Engineering Corporation, 40 MD. App. 267, 391 A. 2d 456, the court went to great lengths to explain the interrelationship of the Maryland Long Arm Statute, § 6-103 of the Courts and Judicial Proceedings Article and §7-210 of the Corporation's and Associations Article,which is part of the subtitle dealing with the registration and qualification of Foreign Corporations.

The court cites 22 OP. Attorney General 262 (1973):

> As we construe the amended statute, the state requires every foreign

> corporation doing interstate or foreign business in the state in such a manner and to such an extent that it is subject to suit in this state, to disclose how it can be reached by process in actions in which it is subject to suit in this state. No attempt is made to exact from the Corporation a consent to be sued in this state in actions in which it could not otherwise be so sued.

Springle, supra, Pg.275,276.

There is no dispute here that the corporate defendant is and was subject to suit in Maryland.

According to the view of some courts, a foreign corporation which has deliberately and wilfully violated the express terms of a penal statute prohibiting the doing of business in the state, before compliance with prescribed terms, is not in a position to ask the protection of beneficial rules of law intended to save law-abiding citizens from loss.

A failure to comply with requirements established for the purpose of enabling service of process on foreign corporations may sometimes place the Corporation in such position that no service of process within the state can

be made on it. Where it is true, the non complying corporation is deprived of the benefit of the statute of limitations, not because it has failed to comply with some policy of the state, but because it has failed to meet the test of presence within the state and is classed as an absentee under the "Saving Clause" of the statute. 36 AM. Jur. 2d. §280.

Maryland's Courts and Judical Proceddings Article, §5-205 denies the benefit of limitations to any person who absents himself from the state or any person who is absent when the action accrues.

The Court of Appeals felt no necessity to determine independently whether §5-204 would apply at all to an action under the federal Securities Exchange Act of 1934. The Court observed that §5-204 does not appear to be an integral part of the state statute of limitations but rather a collateral provision governing whether the statute of limitations shall apply.

Since no statute of limitations is provided

for civil actions under §10(b)-5, the law of limitations of the forum state is followed. Ernst & Ernst v. Hochfelder 425 U.S. 185, 210 29 (1976), rehearing denied. 425 U.S. 986.

Application of §5-204 is particularly appropriate under a federal statute which requires registration of securities (§781 & 77f) and provides a penalty for failure to do so. (77x & 78ff), which penalty includes a heavy fine ($5000) or imprisonment, or both. Denial of the defense of limitations is no more violative of the commerce clause than fines or imprisonment would be.

According to its answers to the Fowler's Interrogatories, General Development Corporation is required to register its lots for sale, interstate, as securities in Vermont, Ohio, Tennessee, and West Virginia.

In United States v Goldberg, 527 F. 2d 165 (2nd Cir. 1975), land developers who failed to register lots pursuant to the Interstate Land Sales Full Disclosure Act and who made misrepre-

sentations to seven named purchasers regarding governmental approval of on-site septic tank systems, where soil conditions were unsuitable and approval had not been given,were convicted of mail fraud and violation of registration requirements.

In spite of the fact that the jury answered the special questions regarding common law fraud negatively, the 10b-5 claim involved different elements and different burden of proof and would not necessarily have been dealt with in the same manner, particularly had not other reversible errors occurred.

Application of §5-204 should have denied the defense of limitations on the common-law-fraud count as well as upon the securities violation claim. The jury was required by the Court to make a decision regarding limitations without any knowledge, information or evidence regarding the possibility of forfeiture of such defense by failure to register, and without deciding the factual issue of whether the Corporation was doing business so as to be required to register.

Summary judgment is precluded where there is any genuine issue as to any material fact. F.R.C.P. Rule 56(c). This same Court of Appeals found in Du-Al Corp.v. Rudolph Beaver, Inc, 540 F. 2d 1230, 1231 (4th Cir. 1976) that where a party had performed purposeful acts in Maryland in relation to the contract, that party (a Massachusetts corporation) was doing business in Maryland.

The trial court and appellate courts decisions, concerning an important state question of limitations, in a way conflicting with the applicable state law, justify the grant of certiorari to review the judgment(s) below.

3. THE COURT OF APPEALS HAS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY THE DISTRICT COURT BELOW SO AS TO CALL FOR THIS COURT'S POWER OF SUPERVISION.

(a) Because the Fowlers had been involved in other litigation, they had filed a motion in October 1976, long before trial, requesting the exclusion of reference to any litigation or other real estate transactions not relevant to the case at hand. The trial judge promised that he would not permit the

Corporation's counsel to attempt to characterize the Fowlers as litigious and that he would stop the line of questioning if so attempted. However, during the trial, when the Corporation's counsel inquired about such litigation during cross examination of Mrs. Fowler and she objected, the trial judge did not keep his promise and he allowed such evidence in, causing Mrs. Fowler to find it necessary to explain such other litigation rather than have it brought out"piece-meal" by Corporation's counsel's further questioning. The other litigation had no relevance whatsoever to the question of the Fowler's reliance upon the Corporation's misrepresentations, and no bearing at all on whether or not the Fowlers should have rightfully believed the Corporation's misrepresentations.

It had been agreed upon, prior to the trial, and was included in the Amended Pretrial Order, that opposing counsel could question the Fowlers upon certain litigation and certain real estate transactions, (A below Vol. II, 37) but the court allowed counsel to exceed those limitations. (A below Vol.II,

pg. 569).

The issue of the exclusion of such testimony had been briefed in memoranda submitted to the Court, accompanying and in opposition to the Fowler's Motion. (A below, Vol I, 220-230.)

Though it may be discretionary with a district court to admit relevant evidence in order to prove reliance, the admission of prejudical and irrelevant evidence is not discretionary particularly where the trial court had previously promised to exclude such evidence. Brown v Royalty, 8th Cir. 1976, 535 F. 2d. 1024, 1028-1029.

The Fowlers submitted in writing, a proffer of exhibits and the reasons therefore, on the 1st day of the trial, June 8, 1978. All of the proffered exhibits were excluded from admission as evidence.

Exhibits 27, 28, 29, 34, 72 & 76 were offered to prove the price and financing manipulations which the Fowlers had alleged. Exhibits 36, 37 and 39 were offered to prove that the Corporation was not registered and not entitled to the defense of

limitations. 28 U.S.C. §1732.

Exhibits 40, 41 and 42 were the Corporation's Securities Exchange Commission 10K reports offered to prove statements relating to defendant Corporation's business, relating to and affecting lot purchasers. 28 U.S.C. §1733.

Exhibits 63 and 64 were certified copies of the Department of Housing and Urban Development records including complaints to that agency regarding situations similar to the Fowlers, offered to prove the Corporation's method of operation and knowledge of complaints, not for the truth of the complaints per se.

Exhibit 69 was offered as past recollection recorded-notes taken by Ms. Fowler as she had reviewed complaints in the Housing and Urban Development's files which had subsequently disappeared from that record. Testimony from such notes would have helped prove the issue of knowledge on Defendant's part.

The trial Court excluded all the proffered exhibits (Appendix E) from evidence thereby

making it not only "harder for Ms. Fowler" to prove her case, but nearly impossible to prove it to the jury.

When Ms. Fowler interrogated the Corporation's official regarding litigation in one specific case, relevant to the Corporation's business activities, she was prohibited from proceeding, with the result that the jury heard about the Fowler's other litigation and heard nothing about that of the Corporation (A. Vol. II, 662, 670,671.

The 4th Cir. Court of Appeals has adopted a rather cavalier approach to the trial court incident, referring to Mrs. Fowler's attempt to question the witness as a "seeking to best General Development at its own game". The court further alluded to the Fowlers' serious equal protection question as "the Fowlers' sauce-for-the-goose sauce-for-the-gander argument". Perhaps that may be a description of equal protection after all, but it raises a question unique to any court. Is a district court judge obligated to apply the federal rules of evidence for the protection of the

litigants parties in an action before him, in an equal manner?

There was justification for Mrs. Fowler's questioning under F R. Evidence, Rule 402 or 404 to show the motives, plans,intentions, pattern of conduct,knowledge, and absence of mistake of the Corporation.

In applying Rule 403, authorizing exclusion of relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence", the trial court denied to the Fowlers the protection which it granted to the Corporation under that rule,when it admitted the Fowlers' other litigation, and excluded the Corporation's. In any event, it is contended that there is reversible error.

(b) Early in the case the Fowlers felt the chill of what appeared to them to be a

prejudicial personal bias and dislike on the trial judge's part.

During earlier hearings Judge Kaufman had grimaced each time Mrs. Fowler attempted to speak, facially expressing his irritation, annoyance and disinclination to listen to anything she had to say. She brought this habit to his attention on October 11, 1977 at a hearing, prior to trial. (R. Vol. XI, p. 44, 45.)

The Fowlers filed an affidavit and a motion for disqualification of the trial judge on January 10, 1978. It was not a frivolous claim, but indeed stemmed from various acts and words of the judge which, to a reasonable observer, could clearly indicate a strong personal bias and prejudice.

The trial judge held an evidentiary hearing and had the opposing attorney testify as to part of the motion for disqualification but refused further discussion of the other parts, (R-Vol. XIV.)

The Court of Appeals addressed itself to one incident described in the Fowlers' Affidavit and totally disregarded the others.

The decision should have been based on whether the affidavit was sufficient.

The Fowlers did then and do now firmly believe that they have been deprived of a fair trial with a fair judge presiding.

(c) The Fowlers timely moved for a new trial after the trial and filed a lengthy memorandum in support of it. (A below, Vol. I. pgs. 285-303.)

They also filed a motion to set aside the verdict as being against the great weight of the evidence. That memorandum demonstrated how the Fowlers had proved every element of the common law fraud count. (A below Vol. I, pgs. 304-315) Their motions were denied.

Now they call earnestly upon this Court to exercise its powers of supervision over the courts below and to review the judgment of the Court of Appeals which has so sanctioned the trial court's departure from the accepted and

uusual course of judicial proceedings that Federal Rights have been denied, and the jury's findings can be shown, by record, to be without evidence to support them. The trial court's decisions regarding securities and limitations, and the facts of the case are intermingled to the extent that facts must be analyzed in order to pass on the Federal question.

Such departure from the accepted and usual judicial proceedings by the lower courts justify the grant of certiorari to review the judgments below.

CONCLUSION

WHEREFORE, for all these reasons, or for any one of them, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit and the District Court of Maryland's Order and Judgment upon which it is based.

Respectfully submitted,

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Pro Se

May 19, 1980

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1692

Kenneth Leo Fowler and
Flora D. Fowler,

Appellants,

v.

General Development Corporation,

Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore, Frank A. Kaufman, District Judge.

Submitted: July 31, 1979 Decided January 29,1980

Before, WINTER, BUTZNER and MURNAGHAN,Circuit Judges.

(Kenneth Leo Fowler and Flora D. Fowler, Appellants Pro Se)
(John A. Wolf, Jervis Spencer Finney, and Ober, Grimes and Shriver, on brief) for Appellee.

PER CURIAM:

Kenneth Leo Fowler and Flora D. Fowler (the "Fowlers")[1], a married couple residing in the State of Maryland, on July 25, 1975 filed suit in the United States District Court for the District of Maryland against General Development Corporation ("General Development"), a Delaware corporation having its principal office in Miami, Florida, on claims arising from interrelated purchases of several Florida lots and negotiations for construction of a house. The business transactions between the parties were involved and spread over a substantial period of time. For the purposes of this opinion, it is not necessary to set them out in detail. It suffices to point out that:

A. Two contracts with General Development to purchase lots were executed by Mr. and Mrs. Fowler in April 1969, calling for initial downpayments and

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1 Mr. and Mrs. Fowler appeared pro se. Mrs. Fowler was better prepared for the venture than many who represent themselves, having been admitted in 1977 to the Bar of the State of Florida.

subsequent monthly installments. Payments contemplated thereunder were made until August 1970. A contract document confirmed that General Development planned to provide water and sewer facilities to the two lots covered by the contracts.

B. An agreement covering an exchange of lots to which the 1969 contracts would apply was entered by the Fowlers and General Development in August 1970. Thereafter, the installment payments were continued until the purchase prices were fully met. There was testimony that the Fowlers were promised that, insofar as the substituted lots were concerned, there was a water line, and that there would be a sewer line when they were ready to build.

C. Negotiations took place in 1973 looking to an agreement by which General Development would construct a house for the Fowlers on another lot than those covered by the earlier contracts, with a credit against the cost to be allowed for the value of one or both of the lots then subject to contract. The negotiations, however, never ripened into agreement.

D. The Fowlers claimed that misrepresentations

were made to them on several occasions as to the true locations of lots, as to whether sewers would be or had been installed to serve lots in which they had interests, and as to the price and other terms applicable to an arrangement by which General Development would construct a house for them.

The complaint combined a count of common law fraud with a count asserting violation of Section 10(b) of the Securities Exchange Act of 1934[2] and Rule 10b-5 thereunder. Section 10(b) makes unlawful use in connection with the purchase or sale of any security any manipulative or deceptive device or contrivance in contravention of SEC rules or regulations prescribed in the public interest or for the protection of investors.

With respect to the Securities Exchange Act claim, the district judge held that it was not maintainable on two grounds: (a) that the transactions involving purchases of Florida real estate and construction of a house did not constitute sales or offers of a security and (b) that the statute of

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2 15 U.S.C. §78j.

limitations clearly barred the claims. The district judge was beyond any doubt correct on the latter point.[3] The action was commenced July 25, 1975. It was established in an uncontroverted way that the Fowlers, prior to July 24, 1972, had knowledge of alleged fraudulent acts claimed to have occurred in 1969. With respect to fraud asserted to have taken place in 1970, in answer to a special question, the jury found that the Fowlers, by the exercise of reasonable diligence or care, should have known of the alleged fraud on or before July 24, 1972.[4] The record also established indisputably that

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3 In affirming on that basis we intimate no opinion as to whether or not the alternate ground was also correct.

4. The question to which an affirmative response was given by the jury read:

> X. Has defendant established by a preponderance of the evidence that plaintiffs, by the exercise of reasonable diligence or care, should have known of the alleged fraud referred to in Question IV (whether the existence of sewer facilities for the lots was falsely represented) on or before July 24, 1972?

the Fowlers had knowledge of alleged fraudulent conduct in 1973 during that year and, in all events, well before July 25, 1974.

"Since no statute of limitations is provided for civil actions under §10(b), the law of limitations of the forum State is followed . . . ."Ernst & Ernst v. Hochfelder,425 U.S. 185, 210 n.29(1976), reh'g denied,425 U.S. 986 (1976). The analogous Maryland statute to which reference is made is the Maryland Securities Act, Corporations and Associations Article of the Maryland Code, §§ 11-101 et seq. §11-703, as it read when the events of this case took place, in pertinent part provides:

> (a) A person is civilly liable to the person buying a security from him if he:
>
> (1) Offers or sells the security in violation of §§ 11-304(b), 11-401, or 11-501 of this title, or of any rule or order under §11-205 of this title which requires the affirmative approval of sales literature before it is used; or
>
> (2) Offers or sells the security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and if he does not sustain the burden

of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

* * *

(f) (1) Except as provided in paragraph(2) of this subsection, a person may not sue under this section more than three years after the contract of sale.

(2) An action may not be maintained:

(i) To enforce any liability created under subsection (a) (1) of this section, unless brought within one year after the violation on which it is based; or

(ii) To enforce any liability created under sub-section (a) (2) of this section, unless brought within one year after the discovery of the untrue statement or omission, or after the discovery should have been made by the exercise of reasonable diligence.[5]

Our decision in Fox v. Kane-Miller Corp. 542 F.2d 915, 918 (4th Cir. 1976), applying the Maryland statute to a § 10b(5) claim, establishes the applicable period of limitations as one year where, as here, discovery has taken place, or by exercise of reasonable diligence should have been made. See also, Sasso v. Koehler, 445 F. Supp. 762, 768 (D.Md. 1978).

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5 Amendments to the statute effective July 1, 1976 came into existence well after the instant action was filed. They would not, in any event, operate to lengthen the applicable limiations period.

The Fowlers sought to deny to General Development its limitations defense on the basis of Maryland Code, Courts and Judicial Proceedings Article §5-204:

> A foreign corporation required by law to qualify or register to do business in the state . . . may not benefit from any statute of limitations in an action at law or suit in equity:
>
> (1) Arising out of a contract made or liability incurred by the corporation while doing business without having qualified or registered; or
>
> (2) Instituted while the corporation is doing intrastate or interstate or foreign business in the state without having qualified or registered.

General Development had not registered or qualified to do business in the State of Maryland.

However, the district judge found, and the record establishes that his finding was altogether correct, that General Development's Maryland activities were purely directed to solicitation of sales interstate in character. The Maryland Court of Appeals has had occasion to interpret and define the interrelationship between Maryland Code, Corporations and Associations Article § 7-203, requiring a foreign corporation to qualify before

doing any intrastate business, Id. § 7-202, requiring a foreign corporation to register before doing any interstate or foreign business and Id. §7-301, denying the right to sue in a Maryland court to a foreign corporation doing intrastate, interstate or foreign business in the State without complying with the registration and qualification statutes. G.E.M., Inc. v. Plough, Inc., 228 Md. 484, 180 A. 2d 478 (1962) held that solicitation of interstate sales does not constitute "doing business" for the purposes of those statutes, and that failure of a foreign corporation to register when engaged in such solicitation does not bar its prosecution of an action arising under the laws of the state of Maryland. Cf. Gilliam v. Moog Industries, Inc., 239 Md. 107, 210A.2d. 390 (1965); Champion Spark Plug Co. v. T.G. Stores, Inc. 356 F.2d 462, 463 (4th Cir.1966); United Merchants and Manufacturers, Inc. v. David & Dash, Inc. 439 F. Supp. 1078, 1087-89 (D.Md. 1977).

Section 5-204 of the Courts and Judicial Proceedings Article is manifestly in pari materia with the statutes addressed in G.E.M., Inc and the other cases cited. Section 5-204 simply provides

another sanction, beyond that spelled out in Corporations and Assocations Article § 7-301, for exactly the same dereliction, i.e. failure to qualify or register to do business on the part of a foreign corporation doing business in Maryland; Hence, if § 5-204 is applicable at all where, as here, the claim is one under a federal statute and not one arising under Maryland law, by its terms § 5-204 does not bar the raising by General Development of its limitations defense.

There is consequently no necessity for us to determine independently whether § 5-204 would apply at all to an action under the federal Securities Exchange Act of 1934. Proper judicial restraint dictates that we refrain from doing so. Nevertheless, we may observe that § 5-204 does not appear to be an integral part of the state statute of limitations itself, but rather is a collateral provision governing whether the statute of limitations shall apply. Even if § 5-204 were part and parcel of the Maryland statute of limitations to which reference is to be made for purposes of § 10(b) and Rule 10(b) (5)

causes of action under the federal Securities Exchange Act of 1934, still the reference is only to the duration of time, and not to other provisions. Cf. Wolf v. Frank,477 .2d 467, 475 (5th Cir. 1973), cert. denied,414 U.S. 975 (1973) where it was unsuccessfully contended that the plaintiffs were barred because of their failure to tender the securities, as required by the state statute to which reference for limitations purposes in a Rule 10(b)(5) action had been made. The court stated:

> When applying the forum's statute of limitations to actions brought under the federal securities laws, federal courts borrow only the chronometric aspects and not the procedural or substantive nuances of the law of the forum.

See also Hudak v Economic Research Analysts, Inc., 499 F.2d 996, 1000 (5th Cir. 1974), cert. denied, 419 U.S. 1122 (1975); Batchelor v. Legg & Co., 52 F.R.D. 553, 558 (D. Md. 1971) (a case under §10(b) (5), where it was held: "Although the period of limitations is determined by state law, the date of accrual is determined by federal law").

For similiar reasons, we express no opinion as to whether application of the state law sanction

prohibiting reliance on the statute of limitations by a foreign corporation in the situation of General Development would violate the commerce clause of the federal Constitution. See Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974).

With respect to the common law fraud charges, the following specific questions were put to the jury following a trial which took place on June 5, 6, 7, 8 and 12, 1978:

> I. Have plaintiffs established by clear and convincing evidence that defendant defauded plaintiffs by falsely representing the location of the lots plaintiffs purchased on or about April 17, 1969?
>
> IV. Have plaintiffs established by clear and convincing evidence that defendant defrauded plaintiffs by falsely representing in April, 1970 the existence of sewer facilities for the lots in Port Charlotte which plaintiffs received in exchange for the lots in North Port Charlotte on or about August 1970?
>
> VII. Have plaintiffs established by clear and convincing evidence that defendant defrauded plaintiffs by falsely representing in June, 1973 the price and/or terms of sale of a house to be constructed by defendant on Plaintiffs' property?

The jury answered "NO" to each of those questions.

In view of those determinations by the jury, one of the issues asserted by the Fowlers on appeal,

relating to an asserted error in the instruction as to the proper measure of compensatory damages for fraud, need not and should not be addressed. Anything we might write would have no effect on the outcome of the case.

The Fowlers on appeal attack four evidentiary rulings, the district judge's refusal to recuse himself after a motion for disqualification had been filed, and his denial of a motion for a new trial.

The first asserted error on an evidentiary ruling concerned admission of evidence about other real estate transactions and prior litigation experience of the Fowlers. The litigation involved another dispute with a builder in which charges of fraud and security act violations were made. One real estate transaction led to a controversy with the installer of a septic tank. Under Maryland law, among the five elements which must be proved by the plaintiff in a common law fraud or deceit action is justifiable reliance. E.g. Wedeman v. City Chevrolet Co. 278 Md. 524, 532, 366 A.2d 7, 12(1976).

It was well within the discretion of the district court to permit evidence as to the Fowlers' earlier litigation and other real estate transactions since the evidence was relevant to whether they had rightfully relied on the asserted misrepresentations, with full belief in the truth thereof.

Seeking to best General Development at its own game, the Fowlers asked a representative of General Development on cross-examination about unrelated litigation involving General Development. They take exception to the district court's refusal to admit the testimony. There was, however, despite the apparent simplicity of the Fowlers' sauce-for-the-goose-sauce-for-the-gander argument, no justification for the admission of the testimony. No question as to justifiable reliance by the defendant was present in the case, nor was there any other point in controversy to which the prior litigation experience of General Development would have been relevant. The discretion of the district judge was properly exercisable to exclude such collateral, indeed extraneous matter which would

have led to mini-trials of issues far removed from the real merits of the case. If it had no relevance, of course, the ruling excluding the evidence was patently correct. Fed. R. Evid. 402. But even if, for some reason not readily apparent, there was some attenuated relevance to the excluded testimony, the action of the district judge was proper in view of Fed. R. Evid. 403. The Rule authorizes the exclusion of relevant evidence where "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The Fowlers have also expressed discontent with a ruling excluding evidence related to complaints about the performance of General Development by other purchasers. The complaints concerned matters unrelated to the present case. The complaints emanated from persons who were not witnesses in the case. The complaints patently were hearsay, and we perceive no error in the ruling of the district judge

that they fell within none of the hearsay exceptions set forth in Fed. R. Evid. 803.

The Fowlers did not raise below, but seek to assert on appeal, a claim that a statement of a deceased General Development employee should not have been received in evidence. The Fowlers did not object when the statement of the deceased witness was introduced at the trial.[6] Hence, nothing is preserved for our review. Fed. R. Evid. 103(a)(1); Bryant v. Sears, Roebuck & Co., 435 F.2d 953, 956 (4th Cir. 1970). Even were the matter before us, we should be slow to conclude that the trial judge was clearly erroneous when he decided that the requirements for admissibility set forth in Fed. R. Evid. 804(b)(5) were sufficiently satisfied. See United States v. West, 574 F.2d 1131, 1135 (4th Cir. 1978).

The Fowlers' claim that the district judge was in error in not disqualifying himself is frivolous. It is generally directed to his rulings which were

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6 When the affidavit of the deceased employee was offered in evidence by General Development's counsel, the trial judge inquired : "Any objection, Mrs. Fowler?" The response of Mrs. Fowler was: "No objection."

not to the liking of the Fowlers. In addition, they have asserted that the district judge was observed, following a pre-trial hearing, in private conversation with one of the counsel for General Development.

Disqualification of judges for bias or prejudice is mandated both by 28 U.S.C. § 144 and by 28 U.S.C. §455(b)(1).[7] Both statutes specify that the bias necessary to establish grounds for disqualification must be personal. "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp.,384 U.S. 563, 583 (1966). Adverse

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7 The motion of the Fowlers proceeded only under 28 U.S.C. § 144. However, inasmuch as they were proceeding pro se,we shall assume that they sought also to invoke 28 U.S.C. §455 (b) (1).

rulings are no sufficient grounds for disqualification. Otherwise, few, if any, cases of any complexity could ever be tried to conclusion. The complaint that the district judge cut short rebuttal argument of Mrs. Fowler at one pretrial argument relates only to an adverse judicial ruling, and does not suggest, much less establish, personal bias or prejudice.

With respect to the asserted conversation between the judge and one of General Development's counsel, the pertinent statutory provision is found in 28 U.S.C. §455(a) which calls for a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." At the hearing on the motion to disqualify, it was established that neither the district judge nor the counsel with whom he was seen talking recalled the instance. It was further proven that the lawyer had appeared before

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8 Ex parte American Steel Barrel Co., 230 U.S. 35, 44 (1913); cf. Carvell v. United States, 173 F.2d 348 (4th Cir. 1949); United States v Haldeman, 559 F.2d, 31, 132-33 (D.C. Cir. 1976), cert. denied , 431 U.S. 933 (1977).

the district judge on other matters and that they had a personal, though not close, acquaintance as fellow members of the bar. It appeared that as residents of the same community, the judge and the lawyer may have attended the same social functions. Nothing was developed to suggest that, by reason of the contact with the lawyer or otherwise, the district judge had any disposition to decide any issues presented on any basis other than what he learned from participation in the case itself. See United States v. Grinnell Corp., supra; cf. Duffield v. Charleston Area Medical Center, Inc., 503 F.2d 512, 517 (4th Cir. 1974); Baskin v. Brown, 174 F.2d 391, 394 (4th Cir. 1949).

We do not accept the underlying premise of the Fowlers' argument: that any contact between Judge and counsel during the pendency of a case, which takes place outside the presence of the opposing party or parties or counsel for such party or parties, is mandatory grounds for recusal. Judicial notice may be taken of the interrelated facts that (a) judges and counsel who regularly practice before

them are in geographical propinquity and not uncommonly are thrown together, without the presence of opposing counsel or parties, and (b) the practice uniformly honored by judges and lawyers alike when so thrown together is scrupulously to avoid any discussion of any pending case. In light of such necessary aspects of life on this crowded planet, it is to be presumed that a contact does not relate to a pending case. Therefore, the mere encounter itself affords no reasonable basis for questioning the judge's impartiality. [9]

Relationships between counsel and court more substantial than the brief meeting of which the Fowlers complain have not been deemed sufficient to require recusal. United States v. Haldeman, supra, 559 F.2d at 138-39; Reddy v. Jones, 419 F. Supp. 1391 (W.D. N.C. 1976); Smith v. Pepsico, Inc., 434 F. Supp. 524 (S.D. Fla. 1977).

The Fowlers have in no way established that the

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9 To the extent that the resolution of the issue might vary, depending on the particular locale (See Smith v. Pepsico. Inc.,434 F. Supp. 524, 526 (S.D. Fla. 1977), our observations pertain fully to the district of Maryland.

discussion between the district judge and opposing counsel concerned this case at all. Cf. Martelli v. City of Sonoma, 359 F. Supp. 397, 399-400 (N.D. Cal. 1973);

> The first allegation is that...Judge Sweigert met with plaintiff and his counsel. Defendants and their attorneys were not notified of the meeting, were not present, and do not know what was said. . . .Nor is the alleged meeting of the judge with plaintiff a sufficient indication of bias or prejudice. The affidavit does not state who initiated the meeting, the purpose of the meeting, or the nature of the statements made.

The matter of disqualification is committed to the sound discretion of the judge himself. United States v. Haldeman, supra, 559 F2d at 131, 139[10] " A decision contrary to recusal, so grounded in the judge's personal view of his continuing ability to act impartially, is reviewable on appeal only if it amounts to an abuse of sound judical discretion."

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10 Since no rule is absolute (perhaps even that one), there re exceptions. See In Re Virginia Electric & Power Co., 539 F.2d 357, 363-64 (4th Cir. 1976). The instant case does not involve any exception, and, as the Virginia Electric opinion recognizes: "Ordinarily, we agree, the decision to sit or not to sit is within the sound discretion of the trial court . . . "

Id. 139. We find no hint of such abuse in the present case.

It should be noted that the amendment in 1974 to 28 U.S.C. § 455 expanded the grounds for disqualification by calling for disqualification when the facts presented "would lead a reasonable person reasonably to infer that bias or prejudice existed. . . ." United States v. Carr, 434 F. Supp. 408, 412 (S.D. N.Y. 1977). As that case is careful to point out, even if disqualification is now called for if reasonable belief in partiality exists, although the judge is in fact totally impartial, nevertheless the belief of the party seeking recusal that the judge is not impartial is not sufficient to require the judge to disqualify himself. Such a belief on the part of the Fowlers is all that they have been able to demonstrate, and that is simply not enough.

Finally, the Fowlers contend that the judge erred in not granting their motion for a new trial. There was little conflict in the testimony. The record clearly supports a determination by the jury that the Fowlers did not meet their burden to

establish all the elements necessary to make out a deceit action. A ruling on a motion for new trial is committed to the discretion of the trial judge and only an abuse of that discretion would afford a basis for reversal on appeal. City of Richmond v. Atlantic Co.,273 F.2d 902, 916-17 (4th Cir. 1960); Sloan v. Colebank,304 F.2d 668 (4th Cir. 1962). The record contains nothing to support even an inference of abuse of discretion.

The facts and legal arguments are adequately presented in the briefs and record. Content that oral argument would not significantly aid the decisional process, we dispense with it and affirm.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KENNETH D. FOWLER and
FLORA D. FOWLER,

Plaintiffs

Civil Action No.
K-75-1017

v

GENERAL DEVELOPMENT CORPORATION,

Defendant

MEMORANDUM AND ORDER

In the light of the jury's Answers to Questions I, IV and VII of the Special Jury Questions, judgment is hereby entered for defendant with regard to Count One. Count Two has previously been dismissed by this Court on the grounds that the contractual rights purchased by plaintiffs from defendant do not constitute a "security" within the meaning of 15 U.S.C. §78c(10). In that connection, this Court stated its views in some detail on the record during a hearing in open Court on April 15, 1977 at which time this Court reviewed the facts, in the light most favorable to the plaintiffs,

reviewed the case law, and applied the same to the facts in this case, giving plaintiffs the benefit of all inferences in the context of the defendant's motion. Additionally, at this time, this Court is of the view that, even if the rights purchased by plaintiffs from defendant constitute a "security" within the meaning of 15 U.S.C. § 78c(10), the cause of action alleged by plaintiffs in Count Two pursuant to 15 U.S.C. § 78j(b) and Rule 10b-5 is barred by limitations. The applicable limitations period is one year. Fox v. Kane-Miller Corp, 542 F.2d 915, 918 (4th Cir. 1976). It is factually uncontroverted that plaintiffs had knowledge of the alleged 1969 fraud before July 24, 1972. Insofar as the alleged 1970 fraud is concerned, the jury determined by its Answer to Question X that plaintiffs, by the exercise of reasonable diligence or care, should have known of the alleged 1970 fraud on or before July 24, 1972. The record in the case, including all of the trial testimony, reveals that it is undisputed that plaintiffs had knowledge of the alleged 1973

fraud during the year 1973 and, in any event, well before one year prior to the institution of the within case. That latter date was July 25, 1975.

The Clerk is directed to enter judgment for defendant. Plaintiffs are to pay the costs of this case. It is so ORDERED, this 14th day of June, 1978.

The Clerk is also directed to send copies of this Memorandum and Order to plaintiffs and to counsel for defendant.

F.J. Kaufman
United States District Judge

(128) Filed 14th June 1978.

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MARYLAND

Civil Action File No. K-75-1017

KENNETH LEO FOWLER AND FLORA D. FOWLER)
)
vs)
) Judgment
GENERAL DEVELOPMENT CORPORATION)
)
)

This action came on for trial before the Court and a jury, Honorable FRANK A. KAUFMAN, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, finding in favor of the Defendant by answering Special Jury Questions as to Count One, and the Court having previously dismissed Count Two.

It is in accordance with the Memorandum and Order of the Court dated June 14, 1978 filed in the above case,

ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the Defendant against

the Plaintiffs, with costs.

Dated at Baltimore, Maryland, this 19th day of June, 1978.

Paul R. Schlitz
Clerk of Court

By: Candice Quinn
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1692

Filed
Feb. 21 1980
William K. Slate, II
Clerk

Kenneth Leo Fower, et al ,

Appellants,

versus

General Development Corporation

Appellee.

O R D E R

Upon consideration of the Appellants' petition for rehearing.

IT IS ORDERED that the petition for rehearing is DENIED. The panel does not favor rehearing and no one has requested a vote on rehearing en banc.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Winter and Judge Butzner.

For the Court,

/s/ William K. Slate, II
Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KENNETH D. FOWLER and
FLORA D. FOWLER,

Plaintiffs

v

GENERAL DEVELOPMENT CORPORATION,

Defendant

OFFER OF CERTAIN EXHIBITS INTO EVIDENCE

Plaintiffs, for the record, offer into evidence in the trial of this case the following exhibits:

P-27, 28, 29, 34, 51, 72 and 76 are offered to prove the price and financing differences between 1973 and 1974 and 1977. They all relate to Port Charlotte and the issue of timing all for damages therefrom.

P-36, 37 and 39 are offered to prove that the defendant was not registered with the State Department of Assessments and Taxation; that service could not be made upon the Maryland unit of General Development because the parent corporation is a Delaware corporation with principal offices

in Florida. They relate to the issue of limitations which defendant has affirmatively pleaded, and they go to the proof that the defendant is not entitled to such defense. At trial the Court forbid any mention of the documents.

P-40, 41 and 42 are S.E.C. 10-K reports (given to the plaintiffs during discovery) I offer them into evidence because they concern statements relating to the defendant's business as it affect lot purchasers. You ruled them out during the proceedings.

P-63, 64 have been discussed earlier. The Court limited use of both exhibits. Plaintiffs request admission as to the entire exhibits. They relate to complaints at HUD and the HUD records. The plaintiffs' arguments were set forth in the memorandum filed on June 5, 1978. The Court did take judicial notice of the rules and regulations governing the Department of Interstate Land Sales Registration.

P-69 is also offered as past recollection

recorded. It is the notes taken by Flora Fowler as she viewed the HUD files relating to the complaints against the defendant. It goes to the issue of knowledge on defendant's part. These documents have been discussed during the proceedings and were informally ruled inadmissible.

The exhibits relating to price and financing after 1973 were previously ruled out by the Court.

Plaintiffs now formally offer all the foregoing exhibits into evidence so that the Court may make a formal ruling as to their admissibility in order that the exhibits may be a part of the record in the event of appellate review.

Flora D. Fowler

Dated: June 8, 1978

CC: John A. Wolf
Court File

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KENNETH LEO FOWLER and
FLORA D. FOWLER,

Plaintiffs

Civil Action No.
K-75-1017

v.

GENERAL DEVELOPMENT CORPORATION,

Defendant

MOTION FOR DISQUALIFICATION

The Plaintiffs herein, Kenneth and Flora Fowler, pray the Court, under 28 U.S.C. 144 for disqualification of the district judge who is assigned to the above captioned case, the Honorable Frank A. Kaufman.

Plaintiffs firmly and sincerely believe that the said judge, Honorable Frank A. Kaufman, is biased and prejudiced against the plaintiffs, particularly against Plaintiff Flora Fowler who is acting in proper person as counsel in the case, so as to prevent and impede impartiality when this

case comes on for trial in January, 1978.

Plaintiffs therefore request that Judge Frank Kaufman remove himself from or be relieved from hearing any further matters or from trying the above entitled case.

Respectfully submitted,

Kenneth Leo Fowler

Flora D. Fowler
9410 Woodberry Street
Seabrook Maryland 20801
(301) 577-2417

Filed the 10th of January, 1978.

Motion denied for reasons

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KENNETH LEO FOWLER and
FLORA D. FOWLER,

Plaintiffs

Civil Action No.
K-75-1017

v.

GENERAL DEVELOPMENT CORPORATION,

Defendant

AFFIDAVIT
IN SUPPORT OF MOTION UNDER
TITLE 28, SECTION 144, U.S.C.

Plaintiffs being first duly sworn, do depose and say:

The Plaintiffs, Kenneth and Flora Fowler, request that Judge Frank A. Kaufman remove himself from or be relieved from hearing any further matters or from trying the above captioned case.

In the opinion of the Plaintiffs, Judge Kaufman has exhibited and demonstrated a personal bias and prejudice against Plaintiffs and in favor of the Defendant and Defendant's counsel. Such bias and prejudice has been manifested in

various ways. Plaintiffs firmly and sincerely believe that in order to preserve their rights and to assure a fair and just trial, such trial must be under the direction of another district judge.

Plaintiffs swear that this motion is not for purposes of mere delay but in order to prevent an appeal after trial.

During the hearings on Janury 5 and January 6, 1978, Judge Kaufman allowed Defendant's counsel to speak freely on the issues. However, he refused to listen to Flora Fowler's arguments in rebuttal. A property interest is involved in this cause of action in the cause itself. Judge Kaufman's rulings affect that property interest. A hearing without an opportunity to be heard is as lacking in due process as no hearing at all. Not only can the constitutionality of such actions be questioned but they also demonstrate a prejudice in favor of Defendant and/or Defendant's counsel. (Transcript, January 6, 1978, pages)Transcript not yet available. F.D.F.

Although Defendant's counsel is a competent attorney, Judge Kaufman is directingthe case and the proceedings in such a manner as to favor the Defendant, thereby exhibiting prejudice against the Plaintiffs.

On January 6, 1978 during the hearing, Judge Kaufman instructed Defendant's counsel to file a Motion for Partial Summary Judgment regarding the damages in the case, with accompanying affidavits, and he required Flora Fowler to answer that motion, also with accompanying affidavits, and to file it before the clerk's office closed on January 6, 1978, unless Plaintiffs agreed to make certain stipulations with Defendant's counsel as to the damages, in writing after meeting with Defendant's counsel that day (January 6, 1978), a Friday, such stipulations to be filed on Monday, January 9, 1978. (transcript, January 6, 1978, pgs.) Transcript not available.F.W.F.

There was already a Motion for Partial Summary Judgment before the Court (Defendant's motion) regarding the damages, which motion has been filed

on December 7, 1977. That motion was one of the open issues to be determined in that final pretrial conference (as well as Plaintiffs' motion to amend the Complaint in order to conform with Judge Kaufman's ruling upon the exclusion of any evidence regarding St. Augustine Shores property).

Defendant's counsel had not even mentioned the filing of yet another motion for partial summary judgment nor had he requested leave so to do.

Judge Kaufman was imposing an unreasonable burden upon the Plaintiffs in "offering" his alternatives. Plaintiffs would have to first receive Defendant's motion for partial summary judgment before they could answer it. Whereas Defendant's counsel's office is located but a few blocks from the federal court house and he has an office staff to assist him in typing and copying, Plaintiffs reside thirty-some miles away in Seabrook, Prince Georges County, and would either be compelled to return there to their own facilities or employ someone in Baltimore City to type their response, after they waited there for Mr. Wolf's motion to be written.

Then, if other materials were found necessary to be attached to the affidavits, and those materials were at their home, it would necessitate a return to their home and then a subsequent trip back to Baltimore in order to file the response before 5P.M.

Additionally, motions for summary judgment are not to be taken so lightly. Under Rule 56 (c) such a motion shall be served at least ten days before the time fixed for the hearing. The party served has that length of time in which to respond. Inasmuch as the trial of this case had been set for Janury 11, 1978, there was no time, under the rules of federal civil procedure, for such a further motion to be disposed of before trial, five days thereafter.

However, Judge Kaufman made it quite clear that it was either stipulate or go through the burdensome procedure described herein. Either choice would operate to Defendant's advantage.

(Transcript, January 6, 1978, pg.) Transcript not available yet. F.D.F.

During a hearing on April 15, 1977, Judge

Kaufman stated:

> Now, I have been pretty hard on Mrs. Fowler and I am going to be harder as I go along
>
> - - - - - - - - - - - - - - - - - -
>
> (Transcript, April 15, 1977, pg. 21) Emphasis added.)

At that time, Plaintiffs thought the remark was merely a figure of speech, but, in effect, it was a prediction which has come to pass. The remark evidences prejudice because it singles out Mrs. Fowler as the object of oppression.

At that same hearing Judge Kaufman himself raised the question of Plaintiffs' submission of their Virginia transcript (from another and completely different case) to Defendant's counsel, Mr. Wolf. Judge Kaufman insisted that that transcript not be merely made avilable for Mr. Wolf's inspection but that Mr. Wolf be allowed to have custody of said transcript for at least 48 hours. At the time Flora Fowler needed the transcript herself because it was involved in an appeal to the Fourth Circuit Court of Appeals. Mr. Wolf had not requested the transcript during

discovery, which at tht point, had been closed by the Court. The Court, sua sponte, opened discovery to allow Mr. Wolf the use of Plaintiffs' transcript. Then Plaintiff Flora Fowler thereafter, on April 19, 1977 mailed a letter and an affidavit to the Court in which she stated her refusal to turn over her transcript to Mr. Wolf on grounds that nothing in the rules compelled her to do so, and further stating that an order to release her property into Mr. Wolf's custody would be an unconstitutional "taking". Flora Fowler had, at no time, refused to allow Mr. Wolf to inspect the transcript in her presence just as she had inspected documents requested from the Defendant in Mr. Wolf's presence. The matter was later resolved by the Plaintiff's delivery to Mr. Wolf of copies of the pages in the Virginia transcript which contained their own testimony. (See transcript, April 15, 1977, pages 14 through 20 regarding the Court's command to Plaintiffs to turn over the transcript to Mr. Wolf, with further discussion on pg 92-94)

In the letter of April 18, 1977, which was

accompanied by the affidavit, Plaintiff Flora Fowler suggested that Judge Kaufman remove himself from the case. In an answering memorandum, dated April 22, 1977, Judge Kaufman first stated that:

> Further, and most important of all, this Court has absolutely no question of its ability to preside in this jury case completely impartially.

The memorandum continued, addressing itself to the transcript question, stating that Mrs. Fowler was not required to make said transcript available to Mr. Wolf.

Plaintiffs have relied upon Judge Kaufman's assurance that he would be able to preside in this forthcoming jury trial "completely impartially". They are no longer able to rely on such impartiality.

At the April 15, 1977 hearing, Judge Kaufman stated, in reference to the aforementioned transcript of the Virginia case:

> The point is: Do you want to try to cooperate on this or not. If you do not, Mr. Wolf can get the transcript, we will give him all the time he needs, and the case will be delayed till he gets it. (Transcript, page 18)

However, although tentative dates on January 9, 16, or 23, 1978 had been set for trial before

the final pretrial conference had been postponed from December 2, 1977 to December 22, 1977, then to January 3, 1978 and thereafter to January 5, 1978, and in spite of the fact that Flora Fowler needed time in which to issue subpoenas for a definite date, Judge Kaufman set the trial five days after the January 5, 1978 pretrial hearing, with two of those days being the weekend. Twenty witnesses for Plaintiffs were to be subpoened to trial. At the hearing on April 15, 1977, when Plaintiff Flora Fowler had mentioned time needed for her to summons witnesses, Judge Kaufman stated that he would try to give a week's notice of the trial date (Transcript, April 15,1977, page 97). When Flora Fowler questioned the sufficiency of time as to one week's notice of trial time, in view of the number of witnesses involved, Judge Kaufman stated:

> Okay then say that. I will try to let you know two weeks before what it looks like, (pg. 99)

The tentative trial date set for January 23, 1978 would have allowed the two weeks' notice for service of subpoenas. However, in a letter to Judge Kaufman,

dated December 20, 1977, Mr. Wolf stated that he had been advised of other trial dates during the weeks of January 16 and 23, ,1978 but would be available for trial during the week of January 9, 1978. At the hearings on January 5th and 6th, the trial date was set for that week, on January 11th. (Transcript, January 5, pg.3-12; transcript, January 6, pg.

Transcript not yet available
F.D.F.

The record shows that Judge Kaufman is clearly prejudiced in favor of Defendant or Defendant's counsel.

At the hearing on January 6, 1978, after listening at length to arguments advanced by Mr. Wolf, Judge Kaufman abruptly cut off Flora Fowler's opportunity to rebut those arguments. (Transcript, pg.) Not yet available. F.D.F.

At the hearing on January 5, 1978, Judge Kaufman first decided, then decided not, to read into the record a newspaper clipping relating to Flora Fowler's challenge to the grading and review of the Maryland bar examination. He then proceeded to question her concerning her prospective testimony during the

coming trial as to what she intended to tell the jury about that situation and about her recent admission to the bar of Florida. (Transcript, pg. 13-19).

Counsel for Defendant has not been questioned on any occasion during these proceedings as to his professional status.

Perhaps Judge Kaufman is not aware of the prejudice and bias he displays against Plaintiffs and in favor of Defendant. A close examination of the record shows that such prejudice and bias do exist in spite of Judge Kaufman's remarks that he is trying to be fair and that he is looking out for Plaintiffs' interests as pro se litigants.

Kenneth Fowler recalls that after one hearing at which Mr. Washburne was present, on July 21, 1976, at which time Judge Kaufman ruled out the securities count (Transcript, pgs. 5 and 18), he heard Mr. Washburne inquire of the clerk where the judge had gone; the clerk responded that he had gone "down the heall". Mr. Washburne, co-counsel with Mr. Wolf, hurriedly left the courtroom.While

Mrs. Fowler was ordering the transcript, Kenneth Fowler walked out after Mr. Washburne and saw him walking and laughing with Judge Kaufman, as they approached the elevator, as intimate friends would walk together.

Now, in restrospect,the cumulative details as set forth herein, together with numerous other incidents in the record, have convinced the Plaintiffs finally that, with Judge Kaufman presiding, there can be no fair and impartial trial of their case; that his refusal to hear Flora Fowler's contentions and arguments will only necessitate an appeal after the trial, causing more expense and more delay.

Although the Plaintiffs have overlooked past incidents and have relied on Judge Kaufman's assertion of being completely impartial, the events of the past week have necessitated this motion for disqualification, in view of the other occurrences which have preceded them.

Kenneth Leo Fowler

Flora D. Fowler.

State of Maryland:

County of Prince Georges:

Sworn to before me this 9th day of January,1978.

_____
Notary

My Commision expires:

July 1, 1978

KENNETH and FLORA FOWLER v. GENERAL DEVELOPMENT CORPORATION

Civil Action No. K - 75 - 1017

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the attached Motion for Disqualification and the accompanying Affidavit in support of said motion were made in good faith on the part of both of the plaintiffs in the above captioned case.

I also certify that the Motion for Disqualification of Judge Frank A. Kaufman was not made for delay of the cause but for the prevention of an appeal later after trial.

The Motion for Disqualification is based primarily on events which occurred on January 5 and January 6, 1978, five and six days before the

trial scheduled for January 11, which trial date was set on January 6, 1978 during a hearing.

However, in conjunction with those latter events, other incidents described by the plaintiffs should be considered. The total picture demonstrates the personal bias and prejudice of Judge Kaufman against the plaintiffs and in favor of the defendant; a bias so strong that it precludes the right to a fair trial to which the plaintiffs are entitled.

Flora D. Fowler

Supreme Court, U. S.
FILED
JUN 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1836

KENNETH LEO FOWLER AND FLORA D. FOWLER,
Petitioners,

v.

GENERAL DEVELOPMENT CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN A. WOLF,
JERVIS SPENCER FINNEY,
1600 Maryland Natl. Bank Bldg.,
Baltimore, Maryland 21202,
(301) 685-1120,
Attorneys for Respondent.

Of Counsel:
OBER, GRIMES & SHRIVER.

JUNE 16, 1980

The Daily Record Co., Baltimore, MD 21202

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1836

KENNETH LEO FOWLER AND FLORA D. FOWLER,
Petitioners,

v.

GENERAL DEVELOPMENT CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported. That opinion is printed in the Appendix to the Petition for Certiorari.[1] A copy of the oral opinion rendered by United States District Judge Frank A. Kaufman, granting partial summary judgment, is reproduced in the Appendix to this Brief for Respondent in Opposition.[2] The memorandum and order and judgment

[1] The Appendix to the Petition for Certiorari will be referred to by the reference "Pet. App.".

[2] The Appendix to Respondent's Brief will be referred to by the reference "Res. App.".

of the district court are included in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Should the Supreme Court review the decisions of the district court and court of appeals below as to specific facts, evidentiary rulings and application of state statutes of limitations, when those decisions are consistent with this Court's holdings in claims brought under the Securities Exchange Act of 1934, with the Federal Rules of Evidence and with Maryland law?

STATUTES INVOLVED

The statutes involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

Petitioners filed suit in the United States District Court for the District of Maryland on July 25, 1975, against Respondent, combining in their complaint a count of common law fraud with a count asserting fraud allegedly arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j (1976), and Rule 10b-5. The claims of fraud arose from Petitioners' purchase from Respondent of two unimproved lots of real property located in Florida, and the negotiations for the construction by Respondent of a house for Petitioners.

Petitioners executed contracts with Respondent in April, 1969, to purchase two lots in Greater Port Charlotte, Florida, a community of over 35,000 located on the West Coast of Florida. The contracts called for initial downpay-

ments and subsequent monthly installments. Petitioners claimed that misrepresentations were made to them in 1969 concerning the location of their two lots. Thereafter, an agreement was reached, in August, 1970, to exchange those lots originally purchased for two lots in another location. Petitioners further claimed that at the time of the August, 1970 exchange of lots, they were told falsely that there would be a sewer line to the lots when they were ready to build a house or houses on one or both of the lots. The installment payments called for under the original contracts were completed by Petitioners.

Further negotiations were conducted in 1973 toward an agreement under which Respondent would build a house for Petitioners on another lot, not the subject of the earlier contracts. Petitioners claimed misrepresentation as to the price and other terms of the proposed agreement for construction of their house. Agreement for the construction of the house was never reached.

Petitioners thus claimed common law fraud and securities act violations for the alleged April, 1969, misrepresentation as to the location of the two lots, for the alleged April, 1970, misrepresentation as to the presence of sewers, and for the alleged June, 1973, misrepresentation as to the price and terms for the construction of a house. By special verdict questions submitted to the jury at the conclusion of a five day trial, Respondent was exonerated of any fraud in each of the three separate instances. The special verdict of the jury further stated that Petitioners should have discovered the alleged 1970 fraud prior to three years before the institution of the suit.

Prior to trial, the district court below granted Respondent's motion for partial summary judgment, dismissing Petitioners' count of securities fraud, ruling that the contractual rights acquired by them did not constitute a "security" (Res. App. p. 1a). The district court filed a

memorandum and order at the conclusion of trial, accompanying the judgment entered in accordance with the jury's special verdict, reaffirming its earlier dismissal of the securities fraud count. The district court's memorandum and order further provided that even had the rights acquired by Petitioners constituted a "security", the cause of action based upon the Securities Exchange Act of 1934 was barred by limitations (Pet. App. p. 24). The United States Court of Appeals for the Fourth Circuit affirmed, *per curiam*.

ARGUMENT

INTRODUCTION

Petitioners propose that this Court review specific evidence and factual issues. Actually, Petitioners want this Court to substitute its judgment for that of the jury, district court and court of appeals below when, in fact, there is an absence of national import and no reason for this Court to grant certiorari in this primarily local matter. It is inappropriate to seek this Court's review of essentially evidentiary questions and concurrent findings of fact by two courts below. Accordingly, the Petition should be denied. *International Brotherhood of Electrical Workers v. Foust*, ____ U.S. ____, 99 S. Ct. 2121, 2124 n.7 (1979); *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630, 635-36 (1967); *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

Hereafter, Respondent will reply directly to the arguments advanced by Petitioners commencing with the heading "Reasons For Granting The Writ" (Pet. p. 27), adopting, for convenience, the same numerical order used by Petitioners.

I.

NO CONFLICT EXISTS IN DETERMINING WHAT IS A SECURITY IN THE INTERSTATE SALE OF UNIMPROVED REAL PROPERTY AND THE DECISION BELOW IS FULLY CONSISTENT WITH *ERNST & ERNST V. HOCHFELDER*, 425 U.S. 185, *reh'g denied*, 425 U.S. 986 (1976).

Petitioners' complaint that there is confusion and conflict as to the meaning of "investment contract" and "security" in the context of the interstate sale of unimproved real property is misplaced. There exists no confusion or conflict in the federal courts. Petitioners' argument to the contrary is simply the first of repeated efforts to have this Court review factual issues properly resolved below.

Petitioners ignore the fact that the jury, when presented with evidence of the three alleged frauds, returned a verdict in favor of Respondent as to each. The court of appeals below affirmed, stating, "The record clearly supports a determination by the jury that the Fowlers did not meet their burden to establish all the elements necessary to make out a deceit action" (Pet. App. pp. 22-23). Since the evidence presented as to the common law fraud count was the same evidence of the Petitioners' claim of securities fraud, a similar result would have obtained had the claim of securities fraud been submitted to the jury. Common law and securities fraud causes of action share similar proof requirements, including the proof of scienter in an action for civil damages under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. *Ernst & Ernst v. Hochfelder*, 425 U.S. 285, *reh'g denied*, 425 U.S. 986 (1976); *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 366 A.2d 7 (1976). The jury decided none existed.

Moreover, Petitioners ignore the proper application of a one year limitations period which bars their § 10(b) claim. It was uncontradicted that Petitioners had knowledge of the alleged April, 1969 fraud prior to July 24, 1972. With

respect to the fraud alleged to have taken place in April, 1970, the jury, in answer to a special question, found that Petitioners, by the exercise of reasonable diligence or care, should have known of that alleged fraud on or before July 24, 1972. There existed no dispute that Petitioners had knowledge of the allegedly fraudulent 1973 conduct in 1973, and well before July 25, 1974 (one year preceding the filing of the action). Since no statute of limitations is provided for civil actions under § 10(b), District Judge Kaufman, in accordance with this Court's holding in *Ernst & Ernst, supra,* at 425 U.S. 210 n.29, applied the analogous one year Maryland statute of limitations contained in The Maryland Securities Act, *Corporations & Associations Article* of the Maryland Code, §§ 11-101, 703 (1975) (subsequent amendments to the Act, effective July 1, 1976, and after filing of the instant action, inapplicable). *Fox v. Kane-Miller Corp.*, 542 F.2d 915, 918 (4th Cir. 1976). The court of appeals approved accordingly, stating, "the district judge was beyond any doubt correct" in holding that the one year statute of limitations barred any Securities Exchange Act claims (Pet. App. p. 5).

With the preceding fully in mind, Respondent now turns briefly to Petitioners' claim that confusion and conflict exist among the federal courts. Petitioners are simply wrong. There exists no conflict or confusion in determining when interstate sales of undeveloped real property constitute "investment contracts" and, thus, a security within the meaning of the Securities Exchange Act of 1934. *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). Apparently, in pressing their argument, Petitioners would have this Court discard the guiding principles for determining what is an investment contract established in *Howey*.

In passing both the Securities Act of 1933, 15 U.S.C. § 77a (1976), and the Securities Exchange Act of 1934, 15 U.S.C. § 78a (1976), Congress did not attempt to identify or

provide a test by which transactions are to be considered securities, leaving that task to the federal courts and Securities Exchange Commission. This Court has recognized that the test of what is an "investment contract" under the 1933 Act and 1934 Exchange Act is the same and turns largely on the facts of the particular transaction under scrutiny. The test "embodies a flexible rather than a static principle, one that is capable of adaptation." *Howey, supra,* at 328 U.S. 299. "[F]orm should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967); *see United Housing Foundation, Inc. v. Forman,* 421 U.S. 837 (1975).

No new test need be crafted solely for transactions involving the interstate sale of real property as Petitioners suggest. The *Howey* principle has become a "sacred measure"[3] in determining the existence of a security and is as appropriate today in transactions involving the interstate sale of Florida real estate as it was at its creation, in 1946. The *Howey* test arose from a factual setting which involved a somewhat different sale of Florida real estate:

> [A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third-party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. 328 U.S. at 298-99.

The definition of an "investment contract" — with its four elements of (1) an investment of money (2) in a common enterprise (3) for profit and (4) generated from the efforts of others — has, recently, been fully considered and

[3] *Braniff Airways, Inc. v. LTV Corp.,* 479 F. Supp. 1279, 1284 (N.D. Tex. 1979).

reaffirmed by this Court in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979), and, earlier, in *Forman*, wherein Mr. Justice Powell stated, at 421 U.S. 837, 852:

> This test, in shorthand form, embodies the essential attributes that run throughout all of the Court's decisions defining a security.

Moreover, this Court, in *Forman*, has spoken to the applicability of the *Howey* test in determining the presence of an investment contract in transactions involving residential real estate. It has been firmly established that if residential real estate represents an asset to be developed or occupied by the purchaser, rather than an investment to be managed by the efforts of others, the real estate transaction does not constitute an investment contract. *Forman, supra*, at 421 U.S. 858.[4]

[4] This Court, in *Forman, supra*, at 421 U.S. 859 n.26, expressed unwillingness to extend securities laws to real estate transactions.

> Moreover extension of the securities laws to real estate transactions would involve important questions as to the appropriate balance between state and federal responsibility. The determination of whether and in what manner federal regulation may be required for housing transactions, where the characteristics of an investment in securities are not present, is better left to the Congress, which can assess both the costs and benefits of any such regulation.

A review of the legislative history of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720 (Supp. 1975-1979), reveals that while it was designed to provide purchasers of real estate with virtually all of the securities law safeguards, Congress expressly declined to give the SEC regulatory control over its enforcement. *Hearings on S. 275 before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 211 (1967); Berman & Stone, *Federal Securities Law and Sale of Condominiums, Homes and Homesites*, 30 Bus. Law. 411 (1975).

The Securities Exchange Commission, through Securities Act Release No. 5347, January 4, 1973, similarly concluded that the offer of real estate, without any collateral arrangements with the seller or sellers, does not involve the offer of a security.

What the Petitioners attempt to foist on this Court as conflict among federal courts with respect to the definition of a security in an interstate land sale setting is, actually, the product of proper application of the *Howey/Forman* principles to the facts peculiar to the individual transactions in issue in the various cases. What Petitioners term as "mixed" results in such cases (Pet. p. 31) are simply results dictated by application of the proper law to different facts. There exists no controversy as to the principle of law to be applied. *E.g., De Luz Ranchos Investment, Ltd. v. Coldwell Banker & Co.*, 608 F.2d 1297 (9th Cir. 1979); *Cameron v. Outdoor Resorts of America, Inc.*, 608 F.2d 187 (1979), *aff'd in part, vacated and remanded in part*, 611 F.2d 105 (5th Cir. 1980); *Woodward v. Terracor Corp.*, 574 F.2d 1023 (10th Cir. 1978); McCown v. Heidler, 527 F.2d 204 (10th Cir. 1975); *Fogel v. Sellamerica, Ltd.*, 445 F. Supp. 1269 (S.D.N.Y. 1978); *Timmreck v. Munn*, 433 F. Supp. 396 (N.D. Ill. 1977); *Davis v. Rio Rancho Estates, Inc.*, 401 F. Supp. 1045 (S.D.N.Y. 1975); *Happy Investment Group v. Lakeworld Properties, Inc.*, 396 F. Supp. 175 (N.D. Cal. 1975); *Contract Buyers League v. F & F Investment*, 300 F. Supp. 210 (N.D. Ill. 1969), *aff'd sub nom, Baker v. F & F Investment*, 420 F.2d 1191 (7th Cir. 1970).

District Judge Kaufman properly applied the *Howey/Forman* principles to Petitioners' transactions which involved solely the purchase of lots and negotiations for the construction of a house, without any collateral arrangements with Respondent. He ruled that the transactions did not constitute the sale of a security and, in granting partial summary judgment, dismissed the securities count (Res. App. p. 1a). That ruling was reaffirmed by the district judge upon his review of all the evidence at the conclusion of trial (Pet. App. p. 24).

This Court, however, like the court of appeals below, need not concern itself with that altogether proper ruling.

No review of the securities issue is necessary, in light of the jury's verdict below and evidence reviewed on appeal. Respondent was absolved of all liability for the alleged frauds and Petitioners' securities claims were barred by limitations, in any event.

II.

THE DECISION BELOW IS NOT IN CONFLICT WITH MARYLAND LAW AND HAS NO NATIONAL SIGNIFICANCE.

The Petitioners attempted below to deny Respondent its limitations defenses on the basis of Maryland Code, *Courts & Judicial Proceedings Article,* § 5-204 (1980):

> A foreign corporation required by law to qualify or register to do business in the State or a person claiming under the corporation, may not benefit from any statute of limitations in an action at law or suit in equity:
>
> (1) Arising out of a contract made or liability incurred by the corporation while doing business without having qualified or registered; or
>
> (2) Instituted while the corporation is doing intrastate or interstate or foreign business in the State without having qualified or registered.

The crux of the issue presented to both the district court and court of appeals below was: Did Respondent have to qualify or register to do business in Maryland? The district court, affirmed by the court of appeals below, ruled that Respondent was engaged solely in the solicitation of interstate sales and did not need to register or qualify. As such, the sanction contemplated by § 5-204 of the *Courts & Judicial Proceedings Article* of the Maryland Code did not apply. The limitations defense was available to Respondent.

Petitioners, as they did below, have confused what constitutes "doing business" for the purposes of subjecting

a foreign corporation to a court's *in personam* jurisdiction with what constitutes "doing business" for purposes of requiring a foreign corporation to register or qualify. Petitioners blur decisions from the Court of Appeals of Maryland dealing with the imposition of *in personam* jurisdiction with that court's decisions dealing with the requirement of registration or qualification, and sanctions imposed for failing to register or qualify.

In rendering its *per curiam* affirmance, it was unnecessary for the appellate court to repeat the uncontroverted facts establishing that Respondent's Maryland activities were purely directed to solicitation of sales interstate in character, namely, the sale of land and/or houses in Florida. The court of appeals then confirmed the district judge's analysis of applicable Maryland law that the mere solicitation of interstate sales does not constitute "doing business" for the purpose of Maryland statutes requiring qualification or registration before doing intrastate, interstate, or foreign business.[5] That analysis of Maryland law is consonant with the holdings of the Court of Appeals of Maryland. *E.g., S.A.S. Personnel Consultants, Inc. v. Pat-Pan, Inc.*, 286 Md. 335, 407 A.2d 1139 (1979); *G.E.M., Inc. v. Plough, Inc.*, 228 Md. 484, 180 A.2d 478 (1962). In *S.A.S. Personnel* and *G.E.M., Inc.* the Court of Appeals of Maryland analyzed the relationship between the Maryland statutes which require qualification or registration and Maryland Code, *Corporations & Associations Article*, § 7-301 (1975). Section 7-301 denies the right to sue in a Maryland court to a foreign corporation doing intrastate, interstate or foreign business in the State but which fails to comply with a registration or qualification requirement. In surveying applicable decisions through 1979, the Court of Appeals of Maryland, in *S.A.S. Personnel, supra*, at 286 Md. 339, 407 A.2d 1142, stated,

[5] *Corporations & Associations Article* of the Maryland Code §§ 7-203, 202 (1975).

> Foreign corporations which merely solicit orders or sales or engage in activities in Maryland directly related to such solicitation or sales, including the interstate delivery of goods, have, however, been held not to be 'doing business.'

Accordingly, the solicitation of interstate sales does not constitute "doing business" within the meaning of the registration or qualification statutes and a failure to qualify or register does not invoke the sanction barring prosecution of an action arising under the laws of the State of Maryland. *See Premier Industrial Corp. v. Nechamkin,* 403 F. Supp. 180 (D. Md. 1975); *accord, Gilliam v. Moog Industries, Inc.,* 239 Md. 107, 210 A.2d 390 (1965); *Champion Spark Plug Co. v. T.G. Stores, Inc.,* 356 F.2d 462, 463 (4th Cir. 1966); *United Merchants & Manufacturers, Inc. v. David & Dash, Inc.,* 439 F. Supp. 1078, 1087-89 (D. Md. 1977).

In affirming, the Court of Appeals for the Fourth Circuit found § 5-204 of the *Courts & Judicial Proceedings Article* of the Maryland Code "*in pari materia*" with the Maryland statutes analyzed by the Court of Appeals of Maryland in *S.A.S. Personnel* and *G.E.M., Inc.* Applying the same analysis, the court of appeals below concurred with the district court's appraisal of the uncontradicted evidence that Respondent's activities did not constitute "doing business" and that Respondent was, therefore, not required to register or qualify. As a result, the sanction prescribed by § 5-204 of the *Courts & Judicial Proceedings Article* of the Maryland Code for failing to register or qualify did not apply to bar Respondent's limitations defense.[6]

[6] Because § 5-204 of the *Courts & Judicial Proceedings Article* did not apply on its own terms to bar a limitations defense, the court of appeals below expressed no opinion as to that statute's applicability, if at all, to a federally created cause of action under the Securities Exchange Act of 1934. The appellate court did observe, however, that in referring to state statutes of limitations in claims under the federal Securities Exchange Act

III.

THE PROCEEDINGS BELOW IN THE DISTRICT COURT WERE PROPER IN EVERY RESPECT.

Petitioners attack the affirmance of three minor evidentiary rulings, the district judge's refusal to recuse himself after their pre-trial motion for his disqualification and the district judge's denial of a motion for new trial. Respondent, hereafter, will address each of the three issues in the order in which they are raised by Petitioners. Each attempt to have this Court review purely evidentiary and factual issues is without merit.

a. Evidentiary Rulings.

Applying Maryland law in this diversity action, the court of appeals below appropriately affirmed the admission into evidence of Petitioners' real estate and prior litigation experience as relevant to the question whether Petitioners rightfully relied upon the alleged misrepresentations. Under Maryland law, one of the five elements which had to be proven by Petitioners in their claims of common law fraud is justifiable reliance. *E.g., Wedeman v. City Chevrolet Co.*, 278 Md. 524, 532, 366 A.2d 7, 12 (1976). In pre-trial proceedings, Petitioners agreed that their prior litigation experience concerning septic systems was admissible. The reference at trial to the litigation matter now complained of was first put in issue by Petitioners, on direct examination, and inquired into on proper cross-examination under the close scrutiny of the district judge, in accordance with the safeguards of Fed. R. Evid. 403. The court of appeals approved the admission of such evidence as being well within the district court's discretion to permit relevant evidence on the question of justifiable reliance.

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of 1934, reference is only to the duration of time and not a "collateral" provision, such as § 5-204, "governing whether the statute of limitations shall apply." (Pet. App. p. 10).

Petitioners next contend they were deprived of the opportunity to introduce documents showing complaints about Respondent involving matters unrelated to the instant action and from persons not present at trial. The court of appeals found no error in the district judge's exclusion of such evidence, describing it as patent hearsay falling into none of the hearsay exceptions set forth in Fed. R. Evid. 803 (Pet. App. pp. 15-16). The exclusion of the documents was a straightforward application of the hearsay rule by the district judge.

Lastly, Petitioners again argue that since their prior litigation experience was admissible, they were automatically entitled to cross-examine a representative of Respondent on totally unrelated litigation. This the court of appeals below aptly described as Petitioners' "sauce-for-the-goose-sauce-for-the-gander argument" (Pet. App. p. 14). Respondent's cross-examination was proper on the issue of justifiable reliance; conversely, Petitioners' line of cross-examination had no basis of relevancy. The scope and extent to which cross-examination should go is within the sound discretion of the trial judge to safeguard against undue burdening of the record, or cumulative, irrelevant and prejudicial matters being placed before the jury. *E.g.*, *Glasser v. United States*, 315 U.S. 60 (1942); *Mannix v. United States*, 140 F.2d 250 (4th Cir. 1944); Fed. R. Evid. 403. Upon review of the record, the appellate court below characterized the unrelated litigation matters as "collateral" and "extraneous" (Pet. App. p. 14). Thus, the court of appeals cited two bases for its approval of the restriction on cross-examination: (1) to avoid irrelevant matters, Fed. R. Evid. 402, and (2) to avoid the confusion and prejudice of mini-trials of issues unrelated to the merits of the case, even had the matters possessed some attenuated relevance, Fed. R. Evid. 403.

b. PETITIONERS' MOTION TO DISQUALIFY DISTRICT JUDGE KAUFMAN.

Petitioners' motion to disqualify District Judge Kaufman was totally unfounded. The record below is devoid of any possible grounds on which to base an argument that the district judge was biased or prejudiced. Quite to the contrary, the record at trial below reflects the greatest latitude was given to Petitioners to enable them to present their case fully. The only extra-judicial grounds asserted in the motion to disqualify was an alleged incident when District Judge Kaufman was purportedly seen talking with one of the counsel for Respondent following a pre-trial hearing. Neither Judge Kaufman or Respondent's counsel recalled the alleged incident. (Appendix on Appeal to the Fourth Circuit vol. XIV pp. 4, 5).

The court of appeals below characterized Petitioners' claim that the district judge was in error in not disqualifying himself as "frivolous" (Pet. App. p. 16). Petitioners are now trifling with this Court's procedures in seeking review of the court of appeals' finding that District Judge Kaufman was totally correct in not disqualifying himself.

Disqualification of judges under either 28 U.S.C. § 144 (1949) or 28 U.S.C. § 455 (1974) requires that the alleged bias and prejudice stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). With respect to what appears to be the real reason for Petitioners' efforts to remove the district judge — adverse rulings — the court of appeals promptly disposed of that ground as insufficient for disqualification. *Ex Parte American Steel Barrel Co.*, 230 U.S. 35, 44 (1913).

The court of appeals below rejected Petitioners' basic premise that any contact between counsel and judge

outside the presence of the opposition during the pendency of a case is automatic grounds for recusal. Further, the court of appeals' review of the record found that Petitioners could not even establish that the alleged discussion between the district judge and counsel involved the case at bar. The decision on recusal is committed to the discretion of the district judge and is reviewable only if there exists abuse of sound judicial discretion. *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977). The court of appeals below stated that Petitioners had established only their "belief" of impartiality, and nothing more. Finding not even the "hint" of abuse of judicial discretion (Pet. App. p. 22) by District Judge Kaufman in deciding not to recuse himself, the court of appeals properly affirmed.

c. Denial Of Motion For New Trial.

Only abuse of discretion by the trial judge in ruling on a motion for new trial will afford a basis for reversal on appeal. *E.g., Sloan v. Colebank*, 304 F.2d 668 (4th Cir. 1962). No abuse was present below.

The court of appeals (Pet. App. p. 22) and district judge below (Appendix on Appeal to the Fourth Circuit vol. II p. 1139) both stated that there was little conflict in the testimony. It was the jury's verdict, based on that testimony and upon proper instructions submitted without objection from Petitioners, that Petitioners did not carry their burden to establish any of the three frauds claimed. The Court of Appeals for the Fourth Circuit found that the record below clearly supported the jury's determination that Petitioners did not carry their burden. It necessarily followed that the appellate court found nothing to support even the inference of abuse of discretion in the district court's denial of the motion for new trial.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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JUNE 16, 1980

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief of Respondent In Opposition were airmailed, postage prepaid, to Kenneth Leo Fowler and Flora D. Fowler, Petitioners, 137 Brandy Hills Drive, Port Orange, Flordia, 32019, this 16 day of June, 1980. I further certify that all parties required to be served have been served.

JOHN A. WOLF,
Attorney for Respondent.

APPENDIX

ORAL OPINION OF UNITED STATES DISTRICT JUDGE FRANK A. KAUFMAN GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING PETITIONERS' SECURITIES FRAUD CLAIMS. (Taken from the Appendix on Appeal to the Court of Appeals for the Fourth Circuit Vol. IX pp. 84-90, proceedings in the District Court of Maryland of April 15, 1977).

Now I am going to the question of and orally rule on the motion for summary judgment on Count Two, and then I will come back to do scheduling with you, and reluctantly, and most reluctantly, Mr. Wolf, I am going to take a moment or two on these boilerplate damage standards.

Section 77b of Title 15 of the United States Code provides in part that the term "security" means any investment contract.

In the Howey case, the Supreme Court in 1946, 328 U.S. 293, faced the question of whether a somewhat different Florida land deal from the deal we have in this case was an investment contract.

In that case, the defendant sold small sections and seemingly in some instances individual rows of Florida citrus groves to out-of-state buyers attracted by promises of enormous profits. Agricultural management of the groves was only feasible on a large-scale basis. All of the purchasers signed management contracts in conjunction with their purchases. The vast majority of those contracts were with the defendant.

The Supreme Court held the arrangement was an investment contract and thus a security and the test that was stated was, in the words of Mr. Justice Murphy, writing for the majority of the Court — I am

not sure, maybe it was a unanimous Court. I am not quite clear and my notes here do not show. His words were: The test is whether the scheme involves an investment of money in a common enterprise, with profits to come solely from the efforts from others.

In United Housing Foundation v. Forman, 421 U.S. 837, 1975, Mr. Justice Powell considered whether shares in a New York cooperative housing project which entitled the purchasers to lease an apartment in the project were securities, and the Supreme Court held that those shares were not securities, largely because the primary purpose of the purchasers of those shares was to secure residential housing for themselves.

At page 852, referring to the Howey test, Mr. Justice Powell wrote: "This test, in shorthand form, embodies the essential attributes that run through all of the Court's decisions defining a security. The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."

In Forman at note 17 on page 853 of 421 U.S., there is a citation to an SEC release. That release applied by its terms to all types of units in real estate projects with the requisite characteristics set forth. That release deals primarily with condominium projects and after discussing the Howey test, the release states that under some conditions, an investment contract may be present in situations where an investor is not wholly inactive but even participates to a limited degree in the operations of the business, and certain examples are gone into.

That test is also referred to, that SEC release test, in footnote 16 in Forman, and there the Court noted that the test in Howey speaks in terms of profits to come solely from the efforts of others and goes on to say: "Although the issue is not presented in this case, we note that the Court

of Appeals for the Ninth Circuit has held that the word 'solely' should not be read as a strict or literal limitation on the definition of an investment contract, but rather must be construed realistically, so as to include within the definition those schemes which involved in substance, if not form, securities," and they cite to the Turner case in 474 F.2d, the Ninth Circuit case, and that cert. had been denied in that case by the Supreme Court.

I mistakenly said a moment ago that footnote 16 referred to the SEC release. That is not referred to until footnote 17 in Forman, but footnote 16 is talking about the same kinds of matters that come up in connection with the SEC release in the Ninth Circuit case.

The Supreme Court said as to the Turner point: "We express no view, however, as to the holding of this case," that is, the holding of Turner.

Now, Turner involved a get-rich-quick scheme by which members of the public bought the right to attend sales promotion meetings and to induce others to buy the same right. The investors participated in the scheme to the extent of inducing and tempting others to invest, and the type of transaction involved was not one in which the profit was to be derived solely from the efforts of others.

The Ninth Circuit, speaking through Judge Duniway, wrote: "We hold only that the requirement that profits come solely from the efforts of others would, in circumstances such as these, lead to unrealistic results if applied dogmatically, and that a more flexible approach is appropriate."

In Happy Investment Group v. Lakeworld Properties, Inc., 396 F. Supp. 175, Northern District of California, Judge Carter considered whether lots in a recreational subdivision were federal securities. He applied the Glenn Turner test of the Ninth Circuit and focused attention on the proposition that the defendants made essential managerial efforts which affected the success of the recreational subdivision.

Then at page 181, he went on to say: "Plaintiffs have tried to stress the passive nature of their investment; they have argued that the community could only come to fruition through the efforts of its promoter, Lakeworld. However, as plaintiffs admit, unless houses were built upon all those vacant lots, and people were attracted there to live, the projects would inevitably stagnate. In order for the community to develop, individual landowners had to build homes. House building cannot be considered a passive activity, requiring only a modicum of effort, as required by the Glenn Turner test."

In a Southern District of New York case in 1975, which is set forth at 401 F. Supp. 1045, the Davis case, the sale of unimproved land in a residential subdivision in New Mexico was contended to be a security.

The Court held there was no security and wrote at page 1050: "If defendants in fact built roads and other improvements, this is not the type of managerial service contemplated in Howey or United Housing. Defendants did not promise to run the development and distribute profits to the plaintiff, as did the operators of the orange groves in Howey. There was no management contract between plaintiff and defendants, nor were defendants obligated by the purchase agreement to perform any such services. Defendants' attempts to induce purchasers to build or their efforts, if any, to enhance living conditions in the development were unrelated to plaintiff. Their interest was in recouping their investment, making a profit and moving on. Any benefit to plaintiff would be purely incidental.

"In the absence of a common enterprise between the parties, the expectation of a profit on resale is insufficient to transform what is essentially a sale of real property into the sale of an investment contract," and so forth.

I think the case law to date indicates that each new scheme must be looked at on its own, just as the cases I have cited indicate, and that general summary is the law as stated by the foremost authority in the field, Professor

Loss, at 1 L. Loss, Securities Regulation 490, Second Edition, 1961, Volume 1.

I think the file in this case reveals undisputedly that the sale of real estate involved in this case did not involve the sale of any security. The extent to which plaintiffs themselves participated in site location and plans for building a house on one or more of their lots takes the case out of the "efforts of others" requirement, even under the liberal approach of the Ninth Circuit in Turner, which the Supreme Court stated it was not taking a position on in its footnote comment in Forman.

The plaintiffs rely on several cases, including a District of Minnesota case at 340 F. Supp. 1318, and a Tenth Circuit case in 1975, 527 F.2d 204. The first case is SEC v. Lake Havasu Estates. That is the Minnesota case. The other case in the Tenth Circuit is the McCown case. I do not think there is anything in those cases that teaches to the contrary of what I have indicated I believe the law to be.

For the reasons that I have stated, the motion for summary judgment as to Count Two is granted. That in no way affects what we do under Count One.

Supreme Court, U.S.
FILED
FEB 10 1980
CLERK

No. 79-1836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

KENNETH LEO FOWLER AND FLORA D. FOWLER,
Petitioners

v.

GENERAL DEVELOPMENT CORPORATION,
Respondent

On Petition For Writ of Certiorari To
The United States Court of Appeals For the Fourth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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GENERAL DEVELOPMENT CORPORATION,

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On Petition For Writ Of Certiorari To the
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For The Fourth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

For further clarification, Petitioners submit the following:

Petitioners purchased two undeveloped lots for investment in Port Charlotte, Florida, knowing nothing about Greater Port Charlotte or North Port Charlotte, the latter community adjoining Port Charlotte but in a different county, using the same lot and block numbers as were used in Port Charlotte. ("The community of over 35,000" is in the already developed area.) The carbon copies of the original contracts stated clearly "Port Charlotte". The copy mailed to Petitioners in Maryland from Florida had an "N" akwardly placed in front of "Port Charlotte" on the contract, thereby transferring Petitioner's interests to the other community without their knowledge or consent. The Fowlers had a written promise that public sewer and water lines would be available to the purchased lots. In August, 1970 the Petitioners exchanged, not the original lots in Port Charlotte but, the lots in North Port Charlotte to which they were transferred after signing the contract. When they travelled to Port Charlotte in 1973 and discovered that there was no sewer line existing or even contemplated in the future, they negotiated with General Development Corporation for a house to be constructed in yet another General Development Corporation community nearby

where there was a public sewer line available (in the Gardens of Gulf Cove). Through interrogatories it was revealed that no sewer line was planned to the original lots either. Firm house prices had been quoted to the Fowlers by the Maryland representatives immediately before the trip to Port Charlotte (which trip was arranged by the Maryland representatives). The same model houses were priced substantially higher by the Florida representatives in Port Charlotte. Financing terms were also higher. Contracts for two houses were drawn up and later mailed to Petitioners after they returned to Maryland. The same model house, for which Petitioners were expecting a contract, was advertised in the Washington Post newspaper, at the originally quoted Maryland price, before Petitioners received their contracts from Florida. The Respondent refused to adjust the contract price. Therefore, the agreement was not completed.

The special verdict of the jury stated "yes" to the question whether the Petitioners should have discovered the fraud by July 25, 1972, three years before the suit was commenced and one year before the

last transactions.

REPLY TO QUESTION PRESENTED BY RESPONDENT

The Supreme Court should review the decisions of the District Court and the Court of Appeals below as to specific facts, evidentiary rulings and application of state statutes of limitations because those decisions are not consistent with this court's holdings in claims brought under the Securities Exchange Act of 1934, with the Federal Rules of Evidence and with Maryland Law, and because constitutional claims have been raised herein and their resolution is dependent upon certain specific facts and evidentiary rulings; and the Supreme Court should review the application of state statutes of limitations because a federal statute, the Securities Exchange Act of 1934, has adopted the limitations statutes of the forum state for such actions.

Respondent has presented a question different from those questions presented by Petitioners and a reply is necessary.

ARGUMENT

A major issue below was the status of the undeveloped transferable lots purchased by the Fowlers pursuant to the General Development Corporation's investment program, said lot interests later to be made the basis for purchase of rental property constructed by General Development Corporation and managed by General Development Corporation;possession and use of the lots retained by General Development Corporation for eight years while development was taking place. Were these investment contracts within the definition of securities under the Securities Exchange Act of 1934?

The securities count was not considered by the jury but was dismissed on a motion for Summary Judgment (Pet. App. p. 24). The jury was not allowed to hear of the Respondent's failure to register as a foreign corporation doing business in Maryland. They were not informed of the Maryland law denying the defense of the statute of limitations to an unregistered foreign corporation. Had the jurors known that the Respondent had failed to comply with Maryland law in regard to registration, that fact alone could have caused a

different verdict. (Pet. App. p. 30,31). Those issues were summarily decided and dismissed by the trial judge. (App. on Appeal, Vol II, pgs. 360-366,934-937,976,977,987-988). There is no jury decision, regarding those two questions, for which this court is asked to substitute its judgment.

Like a voice crying in the wilderness, Petitioners implore this Court of last resort, where it may, to undo the wrongs perpetrated upon them by Respondent and compounded by erroneous rulings below.

I

Petitioners are praying this court to determine whether the lot transactions described in this action are securities and/or investment contracts. This is a question of national importance because of the many land development companies selling lots in interstate commerce all over the United States, using the U.S. mail, the telephone and airlines to accomplish their business, and because of the thousands, maybe millions, of purchasers all over the United States and overseas, who invest in such undeveloped land. This is not "a primarily local matter"; no more so than Howey or Ernst,

or Forman were local matters. See U.S. v. Goldberg, 527 F. 2d. 165 (2d. Cir. 1975); U.S. v Amrep, 560 F. ed. 539, cert. den. 98 S. Ct. 731, 434 U.S. 1015, 54 L. Ed. 2d. 759. Ths issue of the state's denial of the defense of limitations to unregistered foreign corporations who do interstate or foreign business in Maryland is also of more than local concern because the statute of limitations, involved in actions under Rule 10b-5 & §78j, are the statutes of the forum states. The state of Maryland is not alone in following a "saving clause", where absentees are parties to suits, and in denying limitations defenses to unregistered foreign corporations.

> In the event that a foreign corporation does business in a state in disregard of constitutional and statutory provisions prescribing the terms upon which such corporations may transact business therein, the effect of such noncompliance upon the rights and liabilities of the corporation and those dealing with it in the state becomes a matter of importance. 36 Am. Jur. 2d. §280 through §285, and footnotes thereto.

Resolution of this question effects every foreign corporation, from every other state and overseas, which deals with Maryland residents and with other states which have similar provisions regarding limitations.

Respondent contends that it is inappropriate "to seek this Court's review of essentially evidentiary questions and concurrent findings of fact by two courts below." Petitioners requested a jury trial on all the issues. There should be no "concurrent findings of fact by two courts below". All the relevant facts should have gone to the jury. Had all the facts so gone to the jury, the verdict would most probably have been a different one.

In Berenyi v. District Director, 385 U.S. 630, 635,636, the court stated that the "two court" rule expounded applies in the absence of a very obvious and exceptional showing of error. In the case now before the court, Petitioners insist that there was such showing of error in summarily dismissing the securities claim, where there was a dispute as to whether particular facts indicated the existence of an investment contract, and there was error in ruling that the claim was time-barred, in spite of the Maryland denial of the defense of limitations for failure to register. Petitioners are not asking this court to assess the credibility or demeanor of

witnesses but they are now asking the Court to determine the proper law applicable to the undisputed facts in regard to the securities and limitations issues.

In Berenyi, supra, cited by Respondent, (p. 661) this very court further stated:

> To be sure, this Court has not hesitated to undertake independent examination of factual issues when constitutional claims may depend on their resolution.

There was no constitutional claim raised in Berenyi, but there are such constitutional claims raised here: (Petitioners' Question III(3)-whether the trial court's rulings on evidentiary matters violated the Petitioners' constitutional rights of due process and equal protection under the Fifth and Fourteenth Amendments of the United States Constitution? (Pet.p.8, 48,49)

Petitioners are also seeking a review of the law of evidence as applied by the trial court and affirmed by the Court of Appeals.

The question as to whether General Development Corporation was doing business in Maryland, sufficient for the purpose of registration, was a factual question.

Whether General Development Corporation should be denied the defense of limitations, was a factual question for the jury where a jury had been requested.

With all the multitude of cases raising the question of whether lot transactions similar to the Fowler's are securities, with contradictory answers from court to court, there has been no settling opinion from this Court. United Housing Foundation v Forman, should not be the "last word" because Forman has not resolved the question as it concerns the interstate sale of undeveloped lots; nor has Ernst.

Howey, does well when relating to business enterprises but it does not go far enough to help us now, where the investment is not in orange groves but in residential lots, convertible to other lots and other communities, and transferrable into residential structures for rental or residential purposes. Is an investment contract only in the eyes of the beholder, or is it an investment contract for all purposes? When the Fowlers, who are parents of fourteen children, negotiated for a two or three bedroom house, it was for investment as rental property, not to live in. Someone else might purchase

lots in 1969, intending to build a house to live in (in 1977 or 1980) when the contract normally matured, according to its terms, and the Respondent had developed that particular area. Is that not an investment too in view of the fact that the purchaser has no right to possess or use the lot for many years?

Only this Court can finally resolve the matter.

SEC Securities Act Release No. 5347 (1972-73 Transfer Binder) Fed. SEC L Rep. (CCH) §79,163 (Jan. 4, 1973), referred to by Respondent, opened the door for a decision by this Court when it concluded that real estate units other than condominiums could also involve the offer of a security.

The Respondent's footnote regarding Berman & Stone's Federal Securities Law and the Sale of Condominiums, Homes and Homesites does not explain to the Court that the reason Congress declined to give the SEC regulatory control over enforcement of the Interstate Land Sales Full Disclosure Act was because of strong lobbying pressure brought by the National Association of Real Estate Boards and the National Association of Home Builders, despite statements at the hearing, approving of SEC control, by the Secretary

of the Department of Housing and Urban Development and by representatives of the Department of Health, Education and Welfare ,the Federal Trade Commission, and the Bureau of Land Management. (Berman & Stone, supra, p. 427 & footnote 68 thereto)

II

There is a difference between "registration" pursuant to Maryland Corporations and Associations Article. §7-202(to do interstate and foreign business) and "qualification" pursuant to §7-203 (to do intrastate business). Respondent disregards that difference.

Respondent contends that Petitioners have confused "doing business" for in personam jurisdiction with "doing business" for registration or qualification of a foreign corporation. However, the Court of Appeals of Maryland in November 1979 in S.A.S. Personnel Consultants, Inc. v. Pat-Pan, Inc. ,467 A. 2d. 1139, discusses this matter in a footnote on p. 1141, stating that though recent cases "suggest" that the terms are not coterminous or synonymous with the words "transacting any business in §6-103 of the Courts and Judicial Proceedings Article, and not considered therein because the question was not raised, the court's analysis rests on those cases which

have construed the phrase "doing business" in the same way for both purposes.

The issue as to whether a state law denying the limitations defense to an unregistered foreign corporation should be applied to a securities claim is a question of significance and national importance under the federal securities law. Maryland's Corporation and Association Article significantly includes both registration requirements and Blue Sky Law.

This Court very recently held that a New Jersey statute which tolled limitations periods on causes of action against foreign corporations that do not have in-state representatives for service of process, but not against other foreign corporations, is a rational classification not violative of the Equal Protection Clause. 49 LW 2021 (7-8-80) The dissent in that case stated that the tolling statute should be so construed only where the foreign corporation is not amenable to personal jurisdiction. Maryland's Long Arm Statute was used to reach Respondent herein because it was not amenable to personal jurisdiction.

III

a. EVIDENTIARY RULINGS

To Petitioners the evidentiary and recusal rulings, far from minor ones, deprived Petitioner's of a

fair trial with an impartial judge, subjected them to prejudicial, irrelevant and confusing "mini-trials", and denied them equal protection in the judicial proceedings as conducted by Judge Frank Kaufman.

The very reasons given by Respondent to justify the exclusion of its litigation: "to safeguard against undue burdening of the record, or cumulative, irrelevant and prejudicial matters being placed before the jury" were reasons for excluding Petitioner's other litigation. The "two bases" for the Court of Appeals "approval of the restriction on cross-examination: (1) to avoid irrelevant matters, Federal Rules Evid. 402, and (2) to avoid the confusion and prejudice of mini-trials of issues unrelated to the merits of the case, even had the matters possessed some attenuated relevance, Fed. R. Evid. 403", should have been applied to the Petitioner's other litigation.

b. RECUSAL

The record below (in Petitioner's affidavit and supplement thereto) points out particular episodes and incidents which demonstrate the adverse feelings toward

Petitioner Flora Fowler as exhibited on numerous occasions by Judge Frank Kaufman, not related to particular adverse rulings but to the entire case. Judge Kaufman's remarks indicated a pre-disposition to intimidate and to thwart Flora Fowler's efforts to obtain justice.

"If, before a case is over a Judge's bias appears to have become overpowering, we think it disqualifies him. It follows that the judgment must be reversed". Nicodemus v. Chrysler, Corp., U.S.C.A. Sixth Cir. 1979, 596 F. 2d. 156.

In U.S. v. Hickman, U.S.C.A. 6th Cir. 1979 the Court held that the trial court's interjections and interruptions and the antidefendant tone of its interruptions deprived defendants of a fair trial. "Justice must satisfy the appearance of justice". Offutt v U.S. 11, 14, 75 S. Ct. 11, 13.

In Chafin v U.S. 4th Cir., 5 Fed. 2d. 592, an affidavit describing indecorous remarks---indicative of a purpose to convict was held sufficient to show personal bias.

In Morris v U.S. C.C.A. 8th, 26 F. 2d. 444, an affidavit that set forth remarks by the judge prior to trial showed personal prejudice, against the defendant. Judge Kaufman's remakrs showed personal

prejudice against Flora Fowler.

Sections 47 and 144 of the Judicial Code have always been mandatory; 1974 amendments extended that view to Section 455.

Failure of a judge to step aside if he is disqualified under one of the three statutes always requires reversal. Fed. Practice and Procedure, Vol. 13, Wright §3553.

The test is broad enough to require recusal both in those circumstances where partiality is in fact present and where only the appearance of partiality is in fact present. 28 U.S.C. §455(a); Smith v Pepsica, 434 F. Supp. 524, S.D. Fla. 1977.

Judge Kaufman did not make a determination as to Petitioners' Affidavit's sufficiency. Instead he conducted a one sided mini-trial which emphasized only the statement concerning the judges contact with one of the defense attorneys, which neither judge nor attorney recollected but did not deny, and he ignored the other specific episodes recited in the affidavit. The Court of Appeals also chose to ignore everything in the affidavit except the same incident above, brushing aside completely the trial judge's remarks that he'd

"been pretty hard on Mrs. Fowler and was going to be harder as I go along", as well as other incidents sworn to by Petitioners.

c. DENIAL OF MOTION FOR NEW TRIAL

The trial judge further abused his discretion in denying the Petitioners Motion for a New Trial where it was apparent that the jury's verdict was based upon factors other than the undisputed facts of the frauds revealed at the trial in the written and testimonial evidence.

One final point Petitioners add for this Court's observation only.

Not until the time of the jury trial, after three years of preliminary proceedings, was an appearance made in the case by Jervis Spencer Finney. Mr. Finney was, and is, a most accomplished attorney who has specialized in the past in the prosecution of "white collar criminals" (Ted Agnew, former Vice President, and several other well known officials and politicians in the State of Maryland).

Psychologically, his surprise appearance, which consisted of simply being there during the trial,

may have caused the jurors, being human after all and aligning Mr. Finney with the "good guys" as he had been publicized in the fairly recent past, to view Petitioners as "the bad guys" in the case. That could explain the verdict which was (despite exclusions of proper evidence and inclusions of that which was strictly prejudicial) contrary to the law and against the great weight of the evidence.

CONCLUSION

For all the foregoing reasons, Petitioners, the Fowlers, pray this High Court to grant their Petition for Writ of Certiorari. If granted the opportunity, they are confident that they will be able to show, by the record, everything which they have stated herein and in their Petition.

Respectfully submitted,
Flora D. Fowler,
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Port Orange, Florida 32019
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Pro Se

DATE:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Reply to Respondent's Brief in Opposition were mailed postage prepaid to John A. Wolf, 1600 Maryland National Bank Building, Baltimore, Maryland, 21202, this 10th day of Sept. 1980. I further certify that all parties required to be served have been served.

Flora D. Fowler
FLORA D. FOWLER,
Petitioner,
Pro Se.

NOTE: Maryland Corporations & Associations Article, §7-202, is on page 20 of the Petition. Section 7-203 is included in the Appendix herein.

APPENDIX

APPENDIX

§ 7-203. QUALIFICATION TO DO INTRASTATE BUSINESS

(a) Qualification required. - Before doing any intrastate business in this State, a foreign corporation shall qualify with the Department.

(b) Manner of qualification. - To qualify, the corporation shall:

(1) Certify to the Department:

(i) The address of the corporation; and

(ii) The name and address of its resident agent in this State;

(2) File with the Department a certificate which:

(i) States that the corporation is in good standing under the laws of the place where it is organized; and

(ii) Is executed by the official of that place who has custody of the pertinent records; and

(3) File with the Department an officially certified statement which specifies the date and record reference of:

(i) Its charter or, if not incorporated, the instrument under which it is organized; and

(ii) Each amendment and supplement to the charter or instrument under which it is organized.

(c) Period for which qualification effective.-Unless terminated by the corporation, the qualification is effective as long as:

(1) The corporation has a resident agent in this State;

(2) The corporation does not forfeit its right to do intrastate business under the laws of this State; and

(3) If the corporation qualifies or changes its name after June 1, 1951, the name of the corporation complies with the requirements of Title 2 of this article relating to corporate names. (An. Code 1957, art. 23 § 90;1975, ch.311,§2)

Maryland Corporation & Associations Article.